In The

Supreme Court of the United States

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

V.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FAIRFAX COUNTY BAR ASSOCIATION

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I.

QUESTIONS PRESENTED

1. Whether legal fees for purely local real estate title examinations substantially affected trade or commerce among the several states as required by the Sherman Act.

2. Whether the Sherman Act, which is limited in its application to "trade or commerce," should now be judicially extended to the learned professions.

3. Whether an advisory fee schedule promulgated pursuant to a scheme of valid state regulation, embodied in legislation, judicial canon, State Bar regulation and ethical opinions, is immune from challenge under the Sherman Act.

4. Whether the mere suggestion of minimum fees, undertaken for legitimate purposes, constitutes price fixing.

5. Whether the per se rule is appropriate where, as here, the activity in question is an integral part of state regulation and the question presented is both novel and far-reaching in its implications.

6. Whether any rule of fee schedule illegality, which would be wholly without precedent in this context and potentially destructive of the legal profession, should be applied prospectively only.

II.

STATEMENT OF THE CASE

A.

Proceedings Below

Lewis H. and Ruth S. Goldfarb (the Goldfarbs) brought this class action in the United States District Court for the Eastern District of Virginia, against the Fairfax County Bar Association (Fairfax)[1] and the Virginia State Bar (State Bar), charging that the promulgation of an advisory minimum fee schedule, as it applied to legal fees for real estate work, constituted a violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The suit sought treble damages and injunctive

[1] Initially, two other northern Virginia bar associations were named as defendants. The Complaint initially sought treble damages in the amount of $1,200,000.

relief pursuant to §§ 4 and 16 of the Clayton Antitrust Act. 15 U.S.C. §§ 15, 26. Fairfax denied that it had violated the federal antitrust laws. The damage issue was severed, and the issue of liability was tried by the court without a jury. The district court held that Fairfax's promulgation of an advisory fee schedule constituted price fixing in per se violation of § 1 of the Sherman Act.[2]

On February 2, 1973, a judgment was entered enjoining the use by Fairfax of the advisory minimum fee schedule. Fairfax appealed from that judgment to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals held that the Sherman Act was inapplicable. First, it found that the advisory minimum fee schedule did not have a sufficient effect upon interstate trade or commerce. Further, the Court held that restraints upon competition among lawyers are immune from antitrust challenge because a learned profession is not "trade or commerce." Petitioners then sought a writ of certiorari from this Court.

B.

The Parties

The Goldfarbs, in the course of their 1971 purchase of a home in Reston, Virginia, made use of the services of a Fairfax County attorney. The Goldfarbs purport to represent a class of plaintiffs consisting of all home buyers in Reston between February 22, 1968, and February 22, 1972.

Initially, the Goldfarbs sought to bring the suit on behalf of all home owners in northern Virginia and two civic organizations purporting to represent those who could not ob-

[2] The trial court on the other hand held that the role of the state agencies in the matter was state action exempt from antitrust challenge. Accordingly, it dismissed the action as to the State Bar, leaving Fairfax the only defendant in the case.

tain homes in northern Virginia because of the high fees prescribed by bar associations' minimum fee schedules. Subsequently, however, the Goldfarbs voluntarily abandoned the two organizations seeking to recover for potential home owners. The district court then further specifically limited the class to home owners in Reston, Virginia.

Fairfax is a voluntary association of attorneys practicing in Fairfax County, Virginia.

The State Bar is an agency of the Commonwealth of Virginia, created by the Virginia Supreme Court pursuant to § 54-49 of the Code of Virginia, whose membership consists of all attorneys licensed to practice law in Virginia.

C.

The Purchase

This case concerns a transaction that occurred entirely within Virginia. In 1971 the Goldfarbs, who then resided in Arlington, Virginia, signed a contract to purchase a home in Reston, Virginia. Findings of Fact No. 24, Ad. 5-6.[3] At the time of the purchase, the builder who had constructed the Reston home and the real estate agent through whom the home was purchased both maintained their offices in Reston, Virginia. Findings of Fact No. 25, Ad. 6. The purchase was financed by a deposit with a Virginia contractor of $2,000, a down payment of $37,500, and a $15,000 loan from a lending institution, also in Virginia, secured by a first deed of trust on the property. Stip. No. 3, Ad. 16.

The Goldfarbs retained A. Burke Hertz, an attorney licensed to practice law in Virginia, to handle the legal

[3] In this Brief, references to the Addendum hereto will be identified as "Ad. ....." References to the Single Appendix will be identified as "A. ....."

aspects of the transaction, including the examination and certification of the state of title to the property. Stip. No. 4, Ad. 16. Mr. Hertz performed all of the legal services required without leaving the Commonwealth of Virginia. Findings of Fact Nos. 28, 29, Ad. 6. The closing on the purchase of the Goldfarbs' home occurred at Mr. Hertz's Falls Church, Virginia, office. Findings of Fact No. 29, Ad. 6.

The Goldfarbs paid Mr. Hertz a fee for examination of title that happened to be equal to the fee recommended by the advisory fee schedule published by Fairfax and other local bar associations, and also to the fee specified in the Minimum Fee Schedule Report promulgated by the State Bar, an official agency of the Commonwealth of Virginia.

D.

State Regulation and the Advisory Fee Schedule

The advisory fee schedules published by the local bar associations and the State Bar's Minimum Fee Schedule Reports are essential components of Virginia's policy of ethical regulation of the legal profession. Pursuant to the statutory authority of § 54-48 of the Code of Virginia empowering the Supreme Court of Virginia to prescribe a code of ethics governing the professional conduct of lawyers and to establish disciplinary procedures, that court has adopted and promulgated the Canons of Ethics and the Code of Professional Responsibility of the Virginia State Bar. Findings of Fact Nos. 6, 9 & 13, Ad. 1-5. The canons and the Code are the foundations for the advisory fee schedules. Findings of Fact No. 6, Ad. 1.

As we demonstrate more fully below (Argument V, Section C) in connection with the immunity of state-approved action from challenge under the antitrust laws, the State Bar

has erected a regulatory system to support the particular ethical provisions of the Canons and Code relating to advisory fee schedules. The advisory opinions issued by the State Bar, binding on all attorneys practicing in the State of Virginia, affirmed the propriety of advisory fee schedules. Findings of Fact Nos. 6, 9, 10, Ad. 1. As manifested by the repeated issuance of the State Bar Minimum Fee Schedule Reports and by the issuance of advisory opinions, the Commonwealth has placed its stamp of approval on the use of advisory fee schedules for the legitimate purpose of complying with the state-adopted Canons of Ethics and the Code of Professional Responsibility. Findings of Fact Nos. 11, 12, Ad. 2; Stip. No. 19, Ad. 18.

Fairfax, in reliance upon the authority of the State Bar and together with the bar associations of Arlington and Loudoun Counties and the City of Alexandria, adopted its most recent advisory fee schedule on June 12, 1969. Stip. No. 15, Ad. 17. Fairfax took this action after the predecessors of the very fee schedule challenged in this suit had been submitted to the Antitrust Division of the Department of Justice on two separate occasions, in 1961 and again in 1965. Each time the official response stated that the Antitrust Division did not consider such schedules to be violations of the Sherman Act. (A. 49, 54). The 1969 schedule was never circulated to the Association members, but was retained at the Fairfax County Courthouse for the use of any lawyers who expressly requested it.

Fairfax, by resolution on September 16, 1974, rescinded the fee schedule and stated its intention not to reinstitute any such schedule.

III.

PRELIMINARY STATEMENT

In its Brief in Opposition, Fairfax argued that its rescission of its advisory fee schedule mooted this case. Because any judgment by this Court that Fairfax violated the Sherman Act by promulgating a schedule of suggested fees should be applied prospectively only, and because Fairfax has rescinded its advisory fee schedule and stated its intention not to renew it, Petitioners are no longer in need of substantial relief from this Court. A decision on the merits by this Court would not affect the important rights of any party. Under applicable Supreme Court standards this case is therefore not appropriate for Supreme Court review.[4]

This Court, in granting the Petition for Certiorari, apparently disagreed with Fairfax's contentions as to mootness. Nevertheless, without reiterating those arguments here, Fairfax again urges this Court to withhold its hand in this case, since the operative facts no longer exist, the fundamental and substantial rights of the parties can no longer be affected, and great unfairness will result from a retroactive holding that the Sherman Act has been violated.

One other matter raised in Petitioners' Brief (Pet. Br. 24) deserves preliminary comment. The Petition for Certiorari addressed itself only to the interstate commerce requirement of the Sherman Act, the exclusion of the learned professions from the scope of the Sherman Act's terms "trade or commerce," and the state action doctrine as it applies to conduct of the Virginia State Bar. Petitioners con-

[4] *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974): "'[F]ederal courts are without power to decide questions that cannot affect the rights of the litigants before them.'" 416 U.S. at 316 [quoting *North Carolina* v. *Rice*, 404 U.S. 244 (1971)].

tend that Fairfax's failure to cross-petition for certiorari precludes this Court's consideration of any other issues. A long and compelling list of this Court's authorities to the contrary, however, establishes that Fairfax is entitled to review of all alternative grounds urged in support of the judgment below.

It is well settled by decisions of this Court that, when an initial petition for certiorari has been filed, the respondent need not cross-petition for certiorari to be entitled to review of any grounds urged in support of the lower court's decree. *See, e.g., United States* v. *Carignan,* 342 U.S. 36, 38 n.1 (1951); *Stelos Co.* v. *Hosiery Motor-Mend Corp.,* 295 U.S. 237, 238-39 (1935); *Langnes* v. *Green,* 282 U.S. 531, 535-38 (1931); *cf. Swarb* v. *Lennox,* 405 U.S. 191, 202 (1972) (White, J., concurring); *Dandridge* v. *Williams,* 397 U.S. 471, 475 n.6 (1970).

In *Langnes* this Court noted that a respondent's objections to the lower court's decree are reviewable only as a matter of discretion in the absence of a cross-petition for certiorari. Where, however, as here, the respondent seeks only to urge alternative grounds that would *sustain* the lower court's judgment, even when those grounds were rejected by the lower court, it is entitled to Supreme Court review of those grounds as a matter of right. In *Langnes* this Court said:

> "Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge . . . ." *Id.* at 538.

Petitioners rely upon *Strunk* v. *United States,* 412 U.S. 434 (1973), and *NLRB* v. *International Van Lines,* 409

U.S. 48 (1972). In each of these cases, however, the arguments urged by the respondent, if successful, would have dictated an expansion of the judgment of the court of appeals rather than mere affirmance. Accordingly, neither case is apposite in this context.

This Court's established practice, as reflected in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *NLRB* v. *Express Publishing Co.*, 312 U.S. 426 (1941), is to the effect that a cross-petition for certiorari is necessary when the respondent seeks to *enlarge* its rights or *reduce* the petitioner's rights fixed by the lower court's judgment. When, however, the respondent merely seeks to urge an alternative ground for affirming the judgment below, it is clear that no cross-petition for certiorari is necessary.[5]

In the instant case none of the arguments made in this Brief would in any sense attack the judgment of the Fourth Circuit or enlarge Fairfax's rights under that judgment. Under the *Langnes* doctrine and this Court's consistent practice, and in the interest of justice, this Court should therefore consider each of the arguments advanced by Fairfax in this Brief.

IV.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that it did not have jurisdiction under the Sherman Act to decide this case.

First, the record is utterly devoid of the required evidence that the Fairfax advisory fee for title examination had any effect whatsoever upon interstate commerce. Petitioners merely proved that Fairfax promulgated an advisory

[5] *See* Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 769-77 (1974).

fee schedule and adduced evidence of totally disconnected and causally unrelated interstate financial transactions. Their bald assertion that the advisory fee necessarily had an effect upon these interstate transactions is without semblance of factual support. Indeed, the record shows that all transactions connected with the conduct complained of by Petitioners occurred wholly within the Commonwealth of Virginia and that an attorney's examination of title to real estate is a purely local activity. A finding of federal jurisdiction in these circumstances would strip the Sherman Act phrase "trade or commerce among the several States" of any real meaning and thereby destroy the fundamental constitutional delineation between the state and federal domains.

Second, the Court of Appeals decided that the Sherman Act applies only to "trade or commerce," terms that have never included the learned professions. Opinions of this Court for over fifty years have indicated that lawyers practice a learned profession upon which Congress did not intend to impose antitrust regulation. Mechanical application of antitrust principles to the practice of law would in any event destroy the beneficial ethical regulation undertaken by states in the public interest. For this reason, this Court should not at this late date judicially expand the Sherman Act beyond the limits intended by Congress.

Moreover, this case does not involve wholly private activity. The Commonwealth of Virginia, acting through the Virginia Supreme Court and the Virginia State Bar, a legislatively established agency of the Commonwealth, has imposed a scheme of regulation of lawyers' activity of which local fee schedules are an integral part. Fairfax's promulgation of its advisory fee schedule was undertaken pursuant to this regulatory plan. Hence, Fairfax and its members are now caught between antitrust sanctions urged by Petitioners,

on the one hand, and state regulation on the other. In such circumstances, the well-established doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), dictates that antitrust enforcement should yield to the state regulation.

Should this Court decide to apply the antitrust laws with full force to the activities of Fairfax, however, it will find that the facts reveal no antitrust violation. Fairfax promulgated its advisory fee schedule, not to fix fees, but merely to serve the legitimate ends of state regulation. The schedule is merely advisory, and Fairfax never had the authority, nor did it take any action, to enforce the schedule. This Court has long held that such legitimate exchanges of price information do not constitute price fixing in violation of the Sherman Act.

In this area of novel antitrust application, evaluation of the advisory fee schedule should not in any event proceed under the per se rule of illegality. Analysis of the schedule should take into account its purpose and effect, the extent to which it is used and enforced, and the ample justification that it assists members of the bar association in fulfilling their obligations imposed by state regulation. In the absence of the doctrine of *Parker* v. *Brown*, the rule of reason is needed to provide a workable interface between antitrust enforcement and state regulation.

Finally, minimum fee schedules have been in use for decades. They have frequently been relied upon as a guide by courts called upon to establish an appropriate fee for legal services rendered. If fee schedules are now to be outlawed, after all of these years in which it was assumed they were justified, and indeed often were state-approved, the new rule of law should operate only prospectively.

In the case of fee schedules in northern Virginia, officials of the Antitrust Division of the Department of Justice ex-

pressly disclaimed the notion that these fee schedules violated the antitrust laws. No governmental prosecution, until very recently, was ever filed challenging a recommended fee schedule. To subject lawyers to treble damage antitrust liability, potentially aggregating vast sums of money, would be ironic and unfair in light of this backround.

Fundamental injustice would result from a retroactive decision at the expense of lawyers all across the country who assumed only that they were striving to maintain their profession's highest ethical standards. Fairfax's recission of its fee schedule makes retroactive application of any rule of antitrust unlawfulness not only grossly unfair but now also manifestly unnecessary.

V.

ARGUMENT

A.

The Fairfax Advisory Fees For Examination Of Titles To Real Estate Did Not Restrain Trade "Among The Several States."

The Court of Appeals correctly held that Fairfax's promulgation of an advisory fee for title examination did not have a substantial effect upon interstate commerce. Petitioners failed to show that the advisory fee had any effect whatsoever upon any interstate trade and thus failed to meet this essential jurisdictional prerequisite of the Sherman Act. Any interstate commerce effect present in this case was merely incidental and entirely remote from the local conduct at issue.

Two traditional tests are used to determine whether conduct restrains trade "among the several states." The acts complained of must either (1) occur within the flow of interstate commerce, *Las Vegas Merchant Plumbers Ass'n* v. *United States,* 210 F.2d 732, 739 n.3 (9th Cir.), *cert.*

denied, 348 U.S. 817 (1954), or (2) substantially affect interstate commerce, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 234 (1948). Petitioners concede that the activities of Fairfax did not occur within the flow of interstate commerce. Therefore, this Court must decide only whether the advisory fee for title examination substantially affected interstate commerce.

1. PETITIONERS HAVE NOT SHOWN THAT THE ADVISORY FEE FOR TITLE EXAMINATION, A PURELY LOCAL ACTIVITY, HAD ANY EFFECT UPON INTERSTATE COMMERCE.

In *Mandeville Island Farms* this Court spelled out the "substantial effect" test:

> "[G]iven a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence." 334 U.S. at 234.

Whether the alleged restraint caused a substantial adverse effect on interstate commerce must be determined on examination of the record. *Gulf Oil Corp.* v. *Copp Paving Co.,* ..... U.S. ....., 43 U.S.L.W. 4059, 4062 n. 12 (December 17, 1974).

Petitioners did not meet their burden of proof to establish a substantial adverse effect upon interstate commerce. Indeed, the record is devoid of any evidence that would support an inference that Fairfax's promulgation of an advisory fee for title examination had *any* effect whatsoever upon interstate commerce.

Petitioners were residing in Virginia when they contracted to purchase a home in Reston, Virginia. All transactions relating to the purchase of their home, including the

negotiation for sale, contract of sale, title examination, securing the mortgage loan, settlement and all legal services occurred within the Commonwealth of Virginia.

Petitioners rest their case on a melange of irrelevant fact and speculation totally disconnected from the Fairfax advisory fee for title examination: (1) some Fairfax County residents work outside Virginia, (2) some residents of Arlington County, Fairfax County and the City of Alexandria were not Virginia residents in 1965, (3) some out-of-state mortgage money is used to finance some real estate purchases in Virginia, and (4) federal agencies in Washington, D.C. guarantee some real estate loans in Fairfax County.

As the Court of Appeals recognized, these contentions are irrelevant. Admittedly, for instance, a large percentage of Fairfax County residents work outside Virginia. But how can a title examination fee suggested by a bar association advisory fee schedule have any effect whatsoever upon commuting to and from work?

It is specious to contend that the Fairfax fee schedule affected interstate commerce because some home buyers in northern Virginia are former residents of other states. No such effect was demonstrated, and none can logically be imagined. Obviously, some persons have crossed state lines in moving for the first time to Virginia, but common sense alone demonstrates they are not in interstate commerce in the same sense as the travelers in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964), upon which Petitioners so heavily rely.

More importantly, the facts established at trial simply do not show that the suggested fee for title examination had any effect whatsoever on any home buyer's decision whether to buy a home in northern Virginia. It is an elementary non sequitur to conclude that the advisory fee had any effect on home buying and home financing merely because title

examination by a lawyer was a necessary part of those transactions. Petitioners did not show at trial that the title examination fees in Fairfax were higher or lower than they would have been in the absence of the fee schedule. Moreover, even assuming that the schedule resulted in higher fees for title examination, it is sheer speculation to conclude that this fact in itself deterred prospective home owners from purchasing a home in Virginia. The decision to buy a home in a particular state, again as a matter of common sense, does not turn upon the fee charged for examination of title. Indeed, the Fairfax advisory fee did not deter the Goldfarbs or any of the members of the plaintiff class from buying in Virginia.[6] Thus there is no basis in fact or logic, and certainly not in the evidence at trial, for a finding that the advisory fee for title examination affected interstate commerce.

Doctors, Inc. v. *Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3d Cir. 1973), cited by Petitioners, is readily distinguishable. In that case the court refused to dismiss the complaint for lack of subject matter jurisdiction because it alleged that the challenged conduct would eliminate competitors and thereby affect "a significant amount of traffic in out-of-state goods." *Id.* at 53. Thus, assuming the truth of those allegations, the court found that it was "quite likely that the flow of supplies allegedly affected . . . [would], in fact, decline if overall activity in the market decline[d]." *Id.* By contrast, in the instant case there was no allegation

[6] Petitioners assert that the fee schedule restrained interstate commerce in the sense that it deterred *prospective* home buyers. There is no such evidence in the record. Furthermore, no such buyers are members of the plaintiff class. In *St. Anthony-Minneapolis, Inc.* v. *Red Owl Stores, Inc.,* 316 F.Supp. 1045 (D. Minn. 1970), the court noted that it did not need to decide whether a prospective buyer might have standing to challenge a restraint on interstate commerce affecting its activities, since no such prospective buyer was a party to the case.

or proof that the effect of the minimum fee schedule was to eliminate any competitors. More importantly, the record below furnishes no basis whatever for concluding that the advisory fee for title examination had any significant effect upon interstate commerce.

Nor do the various commerce clause cases cited by Petitioners mandate a finding of Sherman Act jurisdiction in this case. In *Wickard* v. *Filburn,* 317 U.S. 111 (1942), this Court upheld provisions of the Agricultural Adjustment Act of 1938 that established wheat quotas for individual farmers. A farmer could be penalized for growing wheat in excess of his quota, even if the wheat was to be consumed on the farm. On the basis of a finding that the consumption of home-grown wheat affected interstate commerce because it caused substantial variations, when viewed in the aggregate, in the nationwide demand for wheat, this Court concluded there that the conduct regulated had a substantial effect upon interstate commerce. In contrast, there is no basis in the record for such a finding in the case at bar.

Similarly, both *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach* v. *McClung,* 379 U.S. 294 (1964), are distinguishable from the instant case. In *Heart of Atlanta Motel* racial discrimination in the renting of motel rooms made it very difficult for Negroes to obtain traveling accommodations. Thus the interstate movement of Negroes was clearly restricted. In *McClung,* excluding Negroes from a restaurant clearly affected the consumption of food moving in interstate commerce. Moreover, both *Heart of Atlanta* and *McClung* involved statutes based on congressional findings that certain prohibited activities affected interstate commerce, and this Court's role was to verify the reasonableness of the legislative presumption. In contrast, the instant case depends not

on statutory presumption but on the state of the record developed at trial. Petitioners have not shown that the Fairfax fee schedule resulted in an increased fee for title examination. Even assuming such a result, Petitioners did not show that the allegedly higher fee affected commerce to any degree, much less to a substantial degree.

Petitioners also contend that, since a per se antitrust offense has been alleged in this case, a substantial effect upon interstate commerce should automatically be presumed. *Burke* v. *Ford,* 389 U.S. 320 (1967), is cited as authority for this sweeping contention. In *Burke* this Court held that a division of territories among local liquor dealers, whose liquor was sent from out-of-state, violated the Sherman Act. Obviously, the very subject of the restraint, liquor, was involved in interstate commerce. In the case at bar, however, the lawyer's service of title examination is the essence of the challenged activity, and it is clearly intrastate. In any event, *Burke* does not stand for the proposition that a per se antitrust offense ipso facto has a substantially adverse effect upon interstate commerce. The Court never even mentioned per se illegality. At most, the decision holds that territorial divisions involving out-of-state liquor "inevitably affected interstate commerce." *Id.* at 322. In the instant case, however, it cannot be said that a higher fee necessarily results from the advisory fee schedule—quite the reverse may be the actual result. Nor can it be said that any higher title examination fee that might result from the schedule has the inevitable effect of deciding prospective home buyers against purchasing homes in the Virginia sector. Realistically viewed, home buyers simply do not make locational decisions on the basis of title examination fees.

This Court's recent decision in *Gulf Oil Corp* v. *Copp Paving Co.*, ... U.S. ...., 43 U.S.L.W. 4059 (Dec. 17, 1974), a case involving per se offenses, among others, confirms (Dec. 17, 1974), a case involving per se offenses, confirms that Sherman Act jurisdiction cannot be presumed on the basis of the per se nature of the challenged conduct. This Court held that "a court cannot presume [substantial effects upon interstate commerce]." *Id.* at 98,323. In addition, lower court decisions, many of which were decided after *Burke*, make clear that where intrastate rather than interstate activity is the subject of the alleged per se restraint, courts must always answer the threshold jurisdictional question—whether the restraint is in commerce or substantially affects interstate commerce—by an examination of the record. Only when interstate commerce is the subject of the restraint may a court then presume a substantial *amount* of such commerce because of the per se nature of the offense. *See Yellow Cab Co.* v. *Cab Employers, Automotive & Warehousemen, Local 881,* 457 F.2d 1032 (9th Cir. 1972); *United States* v. *Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970); *Page* v. *Work*, 290 F.2d 323, 331 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F.2d 732, 747 (9th Cir. 1954).

Surely, a holding that any per se offense, no matter how local in actual effect, automatically confers jurisdiction under the Sherman Act would make a nullity of the commerce clause of the Constitution.

2. Examination Of Title To Real Estate Is A Purely Local Activity And Is Thus Not Likely To Have A Substantial Effect Upon Interstate Commerce.

Because a finding that "an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it," *Wickard* v. *Filburn*, 317 U.S. 111,

124 (1942), courts have often examined carefully whether challenged activity was "essentially local." *See, e.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231 (1947); *Lawson* v. *Woodmere, Inc.*, 217 F.2d 148 (4th Cir. 1954); *Diversified Brokerage Services, Inc.* v. *Neil Adamson Co.*, 1974-2 Trade Cas. ¶ 75,362 (S.D. Iowa 1974).

As the Court of Appeals pointed out in this case, the local nature of the challenged conduct is a factor that should be considered, for "[a]n activity which is part of a 'general local service' is less likely to be subject to the Sherman Act than is an activity which constitutes an 'integral part' of interstate commerce." 497 F.2d at 18 [citing *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 233 (1947)].

This Court gave expression to the "essentially local" formulation in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231 (1947). There, this Court held that the Sherman Act did not reach monopolization of the taxicab business in a city. According to this Court, such a taxicab business was essentially local in nature and neither involved nor affected interstate commerce even though the taxicabs often carried interstate train passengers from one point to another within the city. Similarly, a title examination does not lose its local character because a home owner comes from out of state or borrows money that crossed state lines.

Lower courts, too, have often found that "essentially local" conduct did not substantially affect interstate commerce. For instance, in *Savon Gas Stations* v. *Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963), the Fourth Circuit held that a restrictive covenant contained in a gasoline service station lease did not violate the Sherman Act. The decision was grounded on the fact that the sale of petroleum products at a service station is

local and intrastate in character and that the enforcement of the restrictive covenant did not reach beyond the State of Maryland.[7] *Id.* at 309-10.

Courts have used the "essentially local" formulation in a variety of contexts. Thus, a contractors' association and a labor union, *Albrecht* v. *Kinsella,* 119 F.2d 1003 (7th Cir. 1941), ice and cold storage facilities, *Atlantic Co.* v. *Citizens Ice & Cold Storage,* 178 F.2d 453 (5th Cir. 1949), *cert. denied,* 339 U.S. 953 (1950), barbering, *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F.Supp. 664 (W.D. Mo. 1961), *aff'd,* 301 F.2d 443 (8th Cir. 1962), and property management, *Marston* v. *Ann Arbor Property Managers Ass'n,* 422 F.2d 836 (6th Cir.), *cert. denied,* 399 U.S. 929 (1970), have all been held to be "essentially local" in nature and thus beyond the scope of the federal antitrust laws.

Especially pertinent here are those cases holding various aspects of the practice of medicine to be "essentially local" in nature. For example, the court in *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167 (8th Cir.), *cert. denied,* 361 U.S. 884 (1959), dismissed a complaint alleging a conspiracy on the part of a local medical society to interfere with and restrict the referral of patients to the plaintiff hospital. According to the court, the operation of a hospital was purely local in nature and did not constitute commerce for purposes of stating a claim under the Sherman Act. Nor was the hospital's purely local nature altered in any way by the fact that some of the hospital's patients might have traveled in interstate commerce. *Accord, Spears Free Clinic & Hospital* v. *Cleere,* 197 F.2d 125 (10th Cir. 1952).

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[7] This point is particularly relevant to the case at bar since Fairfax's advisory fee schedule pertained only to lawyers practicing within the Commonwealth of Virginia.

Similarly, in *Riggall* v. *Washington County Medical Society,* 249 F.2d 266 (8th Cir. 1957), *cert. denied,* 355 U. S. 954 (1958), a physician brought an action against a county medical society and its members alleging wrongful refusal of the society to admit him as a member. The antitrust allegations were dismissed on the ground that the practice of medicine was purely local in nature and did not involve or affect interstate commerce. The fact that the physician treated patients from other states did not convert the practice of medicine to interstate commerce. *Accord, Nankin Hospital* v. *Michigan Hospital Service,* 361 F.Supp. 1199 (E.D. Mich. 1973); *see also Robinson* v. *Lull,* 145 F.Supp. 134 (N.D. Ill. 1956); *Polhemus* v. *American Medical Ass'n,* 145 F.2d 357 (10th Cir. 1944).

The record below established that, like the practice of medicine, examination of titles to real estate in Virginia is essentially local in nature. Indeed, it is a *purely* local activity. In searching a title, a Virginia attorney does not cross state lines. Findings of Fact No. 29, Ad. 6. To the contrary, the activity involves only Virginia real estate and Virginia deed book records. Thus a restraint directed at such wholly local activity could never have substantially affected interstate commerce.

3. Any Incidental And Remote Interstate Commerce Effect Present In The Instant Case Does Not Serve To Bring The Local Fee Schedule Applicable To Title Examination Within The Jurisdiction Of The Sherman Act.

Implicit in the "substantial effect" test is a requirement that the challenged restraint actually cause a substantial effect upon interstate commerce, rather than be merely incidental to interstate commerce. Thus, it is often said that jurisdiction under the Sherman Act will exist only if

the challenged conduct has a "direct and substantial, and not merely inconsequential, remote of fortuitous" effect on interstate commerce. *Page* v. *Work,* 290 F.2d 323, 333-34 (9th Cir.), *cert. denied,* 368 U.S. 875 (1961); *see, e.g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948); *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.,* 469 F.2d 416, 418 (5th Cir. 1972); *United States* v. *Bensinger Co.,* 430 F.2d 584, 588 (8th Cir. 1970); *Diversified Brokerage Services, Inc.* v. *Neil Adamson Co.,* 1974-2 Trade Cas. ¶ 75,362 (S.D. Iowa 1974).

A variation of the above formulation holds that "[t]he incidental flow of supplies in interstate commerce does not in itself transform an essentially intrastate activity into an interstate enterprise." *St. Anthony-Minneapolis, Inc.* v. *Red Owl Stores, Inc.,* 316 F.Supp. 1045, 1048 (D. Minn. 1970). For example, in *Hospital Building Co.* v. *Trustees of Rex Hospital,* 1974 Trade Cas. ¶ 74,903 (4th Cir. 1974), *aff'g* 1973 Trade Cas. ¶ 74,428 (E.D.N.C. 1973), the Fourth Circuit recently affirmed a district court's holding that a hospital's purchase of supplies in interstate commerce and other interstate activities were merely incidental to its principal business of operating a hospital. The plaintiff had alleged that the restraint of trade operated upon this business, not the incidental interstate activities. Thus the court held it had no jurisdiction over the case. *Accord, Lieberthal* v. *North Country Lanes, Inc.,* 332 F.2d 269, 271 (2d Cir. 1964); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167 (8th Cir. 1959); *Lawson* v. *Woodmere, Inc.,* 217 F.2d 148 (4th Cir. 1954).

In *Spears Free Clinic & Hospital* v. *Cleere,* 197 F.2d 125 (10th Cir. 1952), the Tenth Circuit was not persuaded by an argument that the alleged antitrust violations, which prevented the plaintiff hospital from taking patients, would

affect interstate commerce by lessening the number of patients who would come to Denver from other states. As the court put it:

> "To come within the purview of the Sherman Act the restraint of commerce or the obstruction of commerce must be direct and substantial and not merely incidental or remote.
>
> * * *
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> A curtailment of the manufacture of articles to be shipped in interstate commerce or the lessening of the number of persons who travel in interstate commerce, resulting from a conspiracy to restrain or monopolize a wholly local activity, is ordinarily an incidental, indirect and remote obstruction to such commerce." 197 F.2d at 126, 127.

In the instant case, the fact that home buyers, mortgage money, and loan guaranties may in some other case cross state lines is merely incidental and quite remote from a lawyer's examination of title to the property involved in this case. Title examination, a purely local transaction, is merely incidental to the purchase and financing of real estate. The above cases teach that incidental and remote connections with interstate commerce will not serve to invoke Sherman Act jurisdiction. Otherwise, virtually *all* activity, no matter how local in operation and effect, would "substantially affect" interstate commerce. In effect, such a construction of the Sherman Act phrase "trade among the several States" would render it meaningless, a result surely intended neither by the framers of our Constitution, nor the drafters of the Sherman Act.

In summary, then, Petitioners concede that the challenged activity is not itself in interstate commerce. They

failed to show below that a lawyer charging a fee for handling a real estate transaction substantially affected interstate commerce. They failed even to demonstrate that what is solely a local activity in most circumstances operated substantially to affect interstate commerce in this particular case. Finally, they misapprehend the decisions of the federal courts which continue to require a showing of effect on interstate commerce, even in antitrust cases involving allegedly per se unlawful conduct.

It has never been sufficient to demonstrate that there is some incidental or remote interstate commerce effect that can be imagined or conjured up in lawyers' briefs. This Court's most recent decision on interstate commerce in an antitrust context demonstrates exactly that. In *Gulf Oil Corp.* v. *Copp Paving Co.* ..... U.S. ....., 43 U.S.L.W. 4059 (December 17, 1974), this Court considered whether a firm engaged in the purely local activity of manufacturing asphaltic concrete came within the scope of both the Clayton Act's "in commerce" test and the Sherman Act's "affecting commerce" test. This Court recognized that the Sherman and Clayton Acts established different jurisdictional standards. However, after finding that the activities were not "in commerce" under the Clayton Act, the Court further considered, at Copp's urging, whether the lesser jurisdictional requirements of the Sherman Act should be read into Sections 3 and 7 of the Clayton Act. This Court, after reviewing the evidence presented to the trial court, said:

> "Even if the Clayton Act were held to extend to acquisitions and sales having substantial effects on commerce, a court cannot presume that such effects exist. The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on inter-

> state markets and the interstate flow of goods in order to invoke federal antitrust prohibitions [citations omitted].

This Court, applying the Sherman Act "effect on commerce" rule, sustained the lower court's finding of no effect.

Here Petitioners concede that a title examination, like the manufacturing of asphaltic concrete, is a local activity. Under *Copp,* therefore, Petitioners must prove that a title examination has in fact had adverse consequences on interstate markets and the interstate flow of goods in order to support Sherman Act jurisdiction. No such adverse consequences have been shown. If supplying asphaltic concrete for an interstate highway does not, without further proof, affect commerce, then surely neither does a title examination in Virginia of real estate located in Virginia by a Virginia attorney for a Virginia resident, irrespective of where the resident might have once lived, irrespective of whether or where he might borrow money to purchase his residence, and irrespective of where he might work.

B.

The Sherman Act Applies Only To "Trade Or Commerce" And Should Not Now Be Judicially Expanded To Reach The Legal Profession.

The Court of Appeals held that the promulgation of a fee schedule, part of an overall system to regulate the legal profession, was protected by a form of limited exclusion from the scope of the antitrust laws available to the "learned professions." 497 F.2d at 15. In the sections that follow, Fairfax demonstrates that the language of the Sherman Act does not apply broadly and mechanically to the "learned professions," that until very recently no court had even sug-

gested to the contrary, and that the fundamental ethical precepts embodied in the self-regulation of the legal profession throughout the nation support the conclusion of the Court of Appeals in this case.

In assessing these arguments of law and policy, this Court must bear in mind, as the cases indicate, that the antitrust laws must be put into the appropriate perspective. Although competition is a fundamental goal in the American economic system, it is not absolute in its commands or unmodifiable in its application. This Court and inferior courts have stated again and again that there are instances in which the goals of the antitrust laws must be balanced and weighed against other fundamental values to which our society owes allegiance.

A mechanistic application of the antitrust laws would be at odds with self-regulation of the learned professions in the implementation of self-imposed ethical standards. The concerns to which the Court of Appeals gave voice in the instant case, in the reconciliation of antitrust policy with the necessities of professional self-regulation, have appeared in every case that has considered this subject to date. This Court cannot ignore those considerations, and, as Fairfax demonstrates in this Brief, the Sherman Act and its policy, as articulated by the legislature and construed by the courts, do not apply to learned professions.

1. The Weight of Judicial Authority Supports the Exclusion of Ethical Self-Regulation of the Learned Professions from the Scope of the Sherman Act.

The Sherman Act forbids every "restraint of trade or commerce among the several States." The pivotal question is whether the practice of law is "trade or commerce" within the meaning of the Act. The overwhelming

weight of judicial authority is to the effect that the practice of law is not subject to the automatic application of the antitrust laws.[8]

The origin of the concept that certain conduct of the learned professions in general, and the legal profession in particular, is outside the scope of the Sherman Act, is found in two decisions of this Court. In *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), this Court ruled that "learned professions" are not "trade or commerce." Speaking for the Court in that case, Justice Sutherland stated:

> "Of course, medical practitioners . . . are not in competition with respondent. They follow a profession and not a trade . . . ." *Id.* at 653.

The practice of law had been similarly labeled by Justice Holmes in an earlier opinion of this Court:

> "[P]ersonal efforts not related to production, is not a subject of commerce . . . . [A] firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another state." *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U.S. 200, 209 (1922).

These statements foreshadowed this Court's clear distinction between trade, covered by the Sherman Act, and the learned professions, outside that statute's scope. In *Atlantic*

[8] The legislative history of the Sherman Act is inconclusive. The Solicitor General's "presumption" (see Brief for the United States, 23 at n. 18) is facile and without any support. It would be more precise to state that the question of the applicability of the Sherman Act to fee schedules was raised in the congressional debates but never answered. Note, however, that the debates make clear that the Department of Justice is in error in suggesting in its Brief (p. 15) that the widespread use of suggested fee schedules is a comparatively recent phenomenon.

Cleaners & Dyers v. *United States,* 286 U.S. 427 (1932), the Supreme Court determined that the word "trade" in the Sherman Act was used in the "general sense attributed to it" by Justice Story in *The Schooner Nymph,* 18 Fed. Cas. 506, 507, No. 10388 (C.C. Me. 1834).

> "Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts *or in the learned professions* [emphasis added], it is constantly called a trade." 286 U.S. at 436.

In *Atlantic Cleaners & Dyers,* this Court knitted together 100 years of judicial interpretation to exclude the profession from the term "trade" in the Sherman Act.

This Court has never changed its position that the learned professions are not within the scope of the phrase "trade or commerce," as used in the Sherman Act. In the years since *Atlantic Cleaners & Dyers,* this Court has had several opportunities to express contrary views, and on each occasion declined.

In *American Medical Association* v. *United States,* 317 U.S. 519 (1943), this Court expressly refused to "consider or decide" the question whether the practice of medicine constituted "trade" under the Sherman Act. In view of that refusal, it is surprising that Petitioners place such great reliance on that case in their brief (38-41). The case concerns the sufficiency of an indictment in which it was charged that the purpose and effect of the alleged restraint was to inhibit the competitive potential of a cooperative group health service. Second, even the court of appeals recognized "the importance of rules of conduct in medical practice, rules which can best be made by the profession itself." 110 F.2d 703, 711 (D.C. Cir. 1940). That justification could not be considered in *AMA* because there was no record, as there is here, of the importance of the

restraint to the profession's self-regulation. The opinion in the D.C. Circuit thus leaves open the question whether ethical regulations justify the restraint. In light of these factual differences and in view of this Court's earlier statements on the scope of the Sherman Act and the learned professions, the Petitioners in this case can hardly take comfort from this Court's silence in *AMA*.

Likewise, in *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 491-92 (1950), and again in the light of the history of its pronouncements on the status of the learned professions under the Sherman Act, this Court refused to equate "trade" with the learned professions. Even more significantly, in a 1952 case, *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 336, Justice Jackson explained the Supreme Court's traditional views on the subject:

> "This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."[9]

Thus, in a string of Supreme Court cases covering more than fifty years, learned professions, including the legal profession, have been placed outside the concept of "trade or commerce" of the Sherman Act.

Where this Court has led the way, lower courts have followed. In *Marjorie Webster Junior College, Inc.* v. *Middle*

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[9] See also *United States* v. *South-Eastern Underwriters Ass'n,* 323 U.S. 533, 573 (1944) where Chief Justice Stone pointed out in his dissent that no one considered the practice of law to be commerce: "The practice of law is not commerce, nor, at least outside the District of Columbia, is it subject to the Sherman Act, and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mail to pay their fees." (Citing *Federal Baseball Club.* v. *National League*). The majority apparently did not disagree.

States Association of Colleges and Secondary Schools, Inc., 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), the court of appeals acknowledged that the Sherman Act had been " 'tailored . . . for the business world,' " [citing *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961)] not for the non-commercial aspects of the liberal arts and the learned professions.

> "In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, [citation omitted] is not sufficient to warrant application of the antitrust laws. 432 F.2d at 654.

In *Riggall* v. *Washington County Medical Society*, 249 F.2d 266, 268 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958) the court of appeals likewise wrote that the practice of the medical profession was "neither trade nor commerce within § 1 of the Sherman Anti-Trust Act. . . ."

The Court of Appeals in this case thus is only the most recent appellate court to have considered the question. Its carefully limited exclusion of aspects of the practice of law from the scope of the Sherman Act is the most extended and considered judicial opinion on the subject.

State courts that have recently considered the subject have excluded from the scope of the antitrust laws certain activities of the legal profession, and in particular the promulgation of suggested minimum fee schedules. In *Estate of Freeman* v. *Freeman*, 355 N.Y.S.2d 336, 34 N.Y.2d 1, 311 N.E.2d 480 (1974), Chief Judge Breitel held that the state law counterpart of the Sherman Act did not apply to the practice of law. Reasoning that a profession is not a business because of its extensive requirements of formal training, limited admission, self-imposition of ethical codes and the duty to subordinate financial rewards to social re-

sponsibility, the court concluded that the "history and purpose of the legal profession and the professional associations supports [sic] the view that the profession is not included within the terms 'business or trade' as used in § 340 of the General Business Law." 355 N.Y.S. 2d at 340.

The same theory applies to what are virtually identical terms in the Sherman Act. Likewise, in *Stafford* v. *Brennan,* 498 S.W.2d 703 (Tex. Civ. App. 1973), the court sustained the validity of the suggested minimum fee schedule against state antitrust attack, stating in terms particularly applicable here:

> "The minimum fee schedule is nothing more than a voluntary information guide or check list. The fee schedule is neither enforced by compulsion, coercion, nor through the Canons of Ethics. . . ." 498 S.W.2d at 707.

Thus, the court held that a provision of Texas law establishing a presumption of reasonableness for a fee prescribed in the minimum fee schedule "does not impose a restraint on competition or trade." 498 S.W.2d at 708.

The only contrary opinion as to the legal profession is found in *United States* v. *Oregon State Bar,* Civil No. 74-362 (D. Ore., filed Nov. 22, 1974), a recent decision of the United States District Court for the District of Oregon denying summary judgment and declining to follow even the carefully limited reasoning of the Fourth Circuit.[10] Once

[10] In its brief the government includes as an appendix *United States* v. *National Society of Professional Engineers,* Civil Action No. 2412-72 (D.D.C., filed Dec. 19, 1974), in which the district court held that certain restrictions on the conduct of professional engineers were not protected by a learned profession exemption. The Chief Judge of the same District Court reached the opposite conclusion in *Bank Building & Equipment Corp.* v. *National Council of Architectural Registration Boards et al.,* Civil Action No. 74-896 (D.D.C., filed Jan. 13, 1975), in which it is expressly held that "the practice of a learned profession is not trade or commerce within the meaning of the Sherman Antitrust Act, 15 U.S.C. § 1." (Memorandum Opinion p. 4).

again, however, as in *AMA,* because of the procedural posture of the case, the record was devoid of the crucial linkage between the challenged conduct and the profession's self-regulation.

For over a hundred years, judicial interpretation of the term "trade" has been overwhelmingly to the effect that the learned professions were excluded. Even after the enactment of the Sherman Act and following the expansion of the term trade," this Court continued to issue opinions in which the learned professions, and particularly the practice of law, were excluded from the statute's scope. Such authority apparently must have been persuasive even to the Antitrust Division, which for 84 years following the enactment of the Sherman Act declined even to bring suit against a bar association for the promulgation of a suggested minimum fee schedule.

Thus, at least since the clear language of *Atlantic Cleaners & Dyers* in 1932, the legal profession has been free to develop on the assumption that its activities related to self-regulation, as the record shows the advisory fee schedule most assuredly is, are not subject to the antitrust laws.

2. Judicial Authority Excluding the Practice of Law from the Scope of the Sherman Act Reflects the Importance of the Profession's Ethical Self-Regulation.

As the Fourth Circuit pointed out below, it is not surprising that the courts have repeatedly distinguished between the professions and the more conventional activities of trade and commerce. In particular, the unique characteristics of the legal profession, and its self-discipline in the form of the Canons of Ethics and Code of Professional Responsibility, provide sound policy grounds for withhold-

ing the mechanical application of the antitrust laws. This country has opted thus far for a legal profession that was more in the nature of a regulated industry than blatantly competitive. The self-regulation of the profession is at the very heart of the considerations that have led courts to exclude the practice of law from the scope of the Sherman Act.

In Virginia, the discipline of competition has been replaced by the regulatory mechanism of the State Bar. The practice of law is comprehensively supervised and regulated by the State Bar, and by the subsidiary city and county bar associations. Entry into the profession is controlled through the bar examination and licensing procedure. Poor services are prevented by enforcement of the Canons of Ethics, and proper fee practices are mandated by the Canons of Ethics as supplemented by the advisory fee schedules. Regulation thus substitutes for competition as the governor of the legal profession.

Indeed, introduction of all forms of competition into the legal profession would be destructive, not only of the profession in its current form, but of the quality legal services that lawyers currently provide. The theory of destructive competition holds that, when price comparisons are determinative to most consumers, and when those consumers are unable to make quality comparisons among lawyers' services, there exists a positive disincentive for the investment of time in legal activities. The inevitable effect would be to reduce the quality of legal services. The greater the difficulty of the consumer in judging quality,

> "... the greater the temptation of competitors to cut corners, since the competitor that skimps does not at once lose all his customers, while the one that scrupulously maintains quality may be inadequately rewarded

for the higher costs of doing so." 2 Kahn, *The Economics of Regulation* (New York 1971) at 176.

The facts of this case focus on the practice of real estate law. The price of destructive competition would be devastatingly high in that area of the practice of law. A deficiency in a title examiner's work might remain hidden for years. In most cases only when a family sought to sell its home, after years of residence and paying mortgage lenders, would it become evident that cheap, though faulty, legal work had deprived the family of the benefits of quiet title.

It should never be a defense to any complaint against a negligent lawyer that the customer got only what he paid for. Faulty legal work should be unprofessional, no matter the cost to the lawyer or the price to the client. Unless this Court is prepared to require abandonment of ethical responsibilities in favor of total reliance on the forces of competition, self-regulation that state bars and bar associations have historically imposed upon their members must be insulated from mechanical and inflexible application of the antitrust laws.

Bar associations have promulgated advisory schedules to facilitate compliance with Canon 12 and DR 2-106(B)(3) of the Code of Professional Responsibility, which charge lawyers with the responsibility for determining their fees, at least in part, in accordance with what is customarily charged in the locality for similar legal services. If the antitrust laws are now to prohibit those schedules as price fixing, the profession may no longer lawfully restrict advertising of prices, since that too would be a form of price fixing. *See, e.g., United States* v. *Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961). That same legal profession would also be required to abandon rules against improper solicitation, since any agreement among

competitors to refrain from competition is unlawful per se. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). Fee-splitting for referrals, pricing on a contingent basis for criminal cases, charging whatever the traffic would bear for legal services—all practices now forbidden under the applicable ethical codes governing the legal profession—would be permissible if the Sherman Act is held to apply in this case. Indeed, any form of self-regulation restraining or modifying all-out competition would subject the profession to antitrust liability. The day after any holding from this Court that the antitrust laws apply with full force, every lawyer in practice will be required to decide whether to obey the ethical canons of the bar association to which he belongs, or whether on the contrary, whether to replace his shingle with a billboard.

Other unforeseen and certainly unintended consequences could flow from such a holding. Lawyers considering the establishment of a partnership, or the amalgamation of law firms, would under some circumstances be required to analyze their plans under the standards of § 7 of the Clayton Act prohibiting anticompetitive mergers. Special fee arrangements for a retainer client might be regarded as unfair methods of competition in violation of price discrimination laws, or, at the very least, exclusive dealing, violative of the Sherman Act. A single law firm in a small town, rather than serving all who need legal services as the Code of Professional Responsibility now requires, might be constrained to consider turning down business to avoid violation of the monopolization provisions of § 2 of the Sherman Act.

Lawyers are not merchandisers, manufacturers or servants in the traditional commercial sense. Their conduct is governed by a special set of rules, where the maximization

of profit—the talisman of the competitive free enterprise system—is not the *summum bonum*. A court urged to alter the traditional canon of interpretation of the term "trade or commerce" of the Sherman Act must face the certain fact that it is remaking the legal profession. This Court has avoided ordering such a restructuring on the sound grounds that self-discipline in this instance is preferable to competition.

3. The Alteration of the Scope of the Sherman Act Should Not be Undertaken by Judicial Legislation.

Petitioners and the government in this case ask this Court to depart from a line of cases that has long permitted the legal profession to develop freely as a "learned profession" on the assumption that its activities are not subject to mechanical and inflexible application of the antitrust laws. Not even the Department of Justice, until very recently, conceived of the notion that the legal profession was engaged in price fixing. Indeed, as the record demonstrates (A. 49, 54), the Antitrust Division of the Department of Justice approved these very fee schedules against which they now so self-righteously contend.

But this Court has cautioned that "it is not for the courts to indulge in the business of policy-making in the field of antitrust legislation." *United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). To subject the practice of law at this point to the strictures of the antitrust laws would be to cast doubt upon an entire regulatory scheme that has served the profession well and enabled it to adjust to the changing realities of this nation's life. If accommodations are to be made, they should be made by the legislature, at either the national level or in the various states. As the Court of Appeals below stated,

> "In our governmental system a legislative body is better equipped to accommodate these restrictions [resulting from the profession's ethical standards] imposed upon the practice of a profession to the overall design and purpose of the antitrust laws." 497 F.2d at 19.

Here, then, we have a parallel to this Court's determination of the judicially erected exclusion from the scope of the Sherman Act for professional baseball. Here, as in *Flood* v. *Kuhn,* 407 U.S. 258 (1972), this Court is faced with cases providing an exclusion from antitrust coverage, answered only by the silence of Congress. In *Flood,* this Court refused to overule its prior decisions excluding baseball from the coverage of the Sherman Act:

> ". . . We continue to be loath, fifty years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond more inference and implication, has clearly evinced a desire not to disapprove them legislatively.
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> * * *
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> And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial action." 407 U.S. at 283-85.

In 1922, Mr. Justice Holmes wrote that the practice of law was not commerce subject to the antitrust laws. In 1931, this Court ruled that "learned professions" are not "trade or commerce." In 1932, the Court again excluded the "learned professions" from "trade." In 1949, the Court again declined to equate "trade" with the learned professions. In 1952, Mr. Justice Jackson wrote that competition, conventional in the business world, was not proper for a pro-

fession. Mr. Chief Justice Stone had pointed out in 1944 that the practice of law was not commerce so as to be subject to the antitrust laws.

In spite of repeated statements to this effect both by this Court and by lower courts, Congress has not seen fit to take any action to correct those distinguished justices and judges if they were wrong. What Congress has not done since 1922 this Court should not rush to do now. The subjection of lawyers across the country not only to remedial but to punitive laws is a fate that, in view of this Court's reluctance to repudiate earlier decisions despite opportunities to do so, it should now refuse to impose.

C.

The Fairfax Advisory Fee Schedule Is Exempt From Antitrust Challenge As Conduct Sanctioned And Approved By State Regulation.

The federal antitrust laws are not applied to disrupt state regulation. In *Parker* v. *Brown,* 317 U.S. 341 (1943), the Supreme Court provided a rationale for this balancing of policies and held private action occasioned by state regulation exempt from antitrust challenge.

This case presents the conflict between state regulatory requirements and federal antitrust policy in stark terms. Fairfax published an advisory fee schedule prompted and sanctioned by appropriate state regulatory authority. Petitioners seek to challenge that conduct under the antitrust laws. *Parker* v. *Brown* teaches that this conflict should be resolved in favor of state regulation.

1. FAIRFAX'S ADVISORY FEE SCHEDULE WAS PROMULGATED PURSUANT TO A VALID PROGRAM OF REGULATION ESTABLISHED BY THE COMMONWEALTH OF VIRGINIA.

The Commonwealth of Virginia seeks to maintain high standards of performance and behavior within the legal profession. That policy is clearly reflected in its statutes regulating the practice of law and the Virginia Supreme Court's adoption of the Canons of Ethics and the Code of Professional Responsibility. These statutes and the Supreme Court's Rules, together with the implementing activities of the State Bar, constitute the basis of the regulatory scheme supporting that valid state policy.

The Court of Appeals below found that the state policy embodied in the Code of Professional Responsibility was in the public interest. This Court likewise came to that conclusion in *Lathrop* v. *Donohue,* 367 U.S. 820, 843 (1961):

> "Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal services available to the people of the State .... It cannot be denied that this is a legitimate end of state policy."

See also *Semler* v. *Oregon State Bd. of Dental Examiners,* 294 U.S. 608, 612 (1935) ("What is generally called the 'ethics' of the profession is the consensus of expert opinion as to the necessity of such standards.").

The Virginia State Bar is created by statute and authorized to supervise and regulate the activities of lawyers in Virginia. Va. Code §§ 54-48 *et seq.* As the administrative agency of the Supreme Court of Virginia, the State Bar administers rules and regulations promulgated by the Su-

preme Court to govern the conduct of attorneys.[11] The Virginia statutes give the Supreme Court of Virginia general authority to prescribe a code of ethics governing the professional conduct of lawyers. See Va. Code § 54-48(b). Among these ethical rules are, for instance, prohibitions against charging excessive fees and against advertising.

Of particular importance to this case, pursuant to that statutory authority, the Supreme Court has promulgated the Canons of Ethics and the Code of Professional Responsibility, which, as the District Court found, *contemplate and approve* fee schedules. Findings of Fact 6, Ad. 1.

Canon 12 of the Canons of Ethics provided that, in setting a fee, a lawyer may properly consider, in addition to five other factors, "the customary charges of the Bar for similar services." Canon 12 further provided that, in determining those customary charges, a lawyer could properly "consider a schedule of minimum fees adopted by a Bar Association." The Virginia Code of Professional Responsibility, which succeeded the Canons of Ethics in 1971 and was adopted as part of the Virginia Supreme Court Rules, provides in EC 2-18:

> "Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees." (*Ibid.*)

Similarly DR 2-106(B)(3) of the Code of Professional Responsibility provides that one factor to be considered in determining the reasonableness of a fee is "[t]he fee customarily charged in the locality for similar legal services." (*Ibid.*)

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[11] The State Bar's authority to investigate complaints of unprofessional conduct is the enforcement backbone of the regulatory scheme provided by the Commonwealth for licensed lawyers.

As a group, these ethical rules promulgated by the Supreme Court of Virginia constitute a coherent and consistent approval of the minimum fee schedule concept as a guide to reasonableness of fees. The legislature authorized the Supreme Court to issue the ethical rules. In its special role as regulator of the legal profession, the Supreme Court chose to adopt the minimum fee schedule concept as an integral part of its ethical regulation. Nothing could more clearly set forth state policy than this fabric of Supreme Court rules admonishing every lawyer to consider minimum fee schedules as evidence of reasonable, and therefore ethically sound, fees.

But the Supreme Court has gone further to enforce the regulation of lawyers' fees in Virginia through the adoption of minimum fee schedules. The Virginia Supreme Court has authorized the State Bar to render advisory opinions on questions of professional conduct. Findings of Fact 10, Ad. 1; Stip. 19, Ad. 18. At least two such opinions of the State Bar Committee on Legal Ethics signify the intention of the State Bar to regulate personal solicitation, an ethics offense, by the use of suggested fee schedules.

In Opinion No. 98, issued June 1, 1960, the Ethics Committee ruled that a form of prohibited personal solicitation occurs when an attorney, for the purpose of increasing his legal business, intentionally and regularly charges less than the customary charges of the local bar for similar services, as reflected in a schedule of suggested minimum fees. (A. 45). In Opinion No. 170, May 28, 1971, the Ethics Committee determined that advisory fee schedules are one element to be considered along with those set forth in Canon 12 and DR 2-106(B) in determining a proper fee, and that habitual charging of less than the minimum fee schedule for the purpose of solicitation may constitute evidence of professional misconduct. (A. 47).

These opinions by the State Bar, binding on every Virginia lawyer, expressly approve the use of advisory minimum fee schedules. Yet another instance of state approval occured in 1962 and 1969, when the State Bar published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. The 1969 Report stated:

> "The recommended minimum fee figures in the committee's report represent the consensus recommendation of members of the committee as to fees which should be assessed in 1969 for the legal services indicated." (A. 25; Findings of Fact 12, Ad. 2).

The State Bar relies upon local bar associations, in accordance with EC 2-18 and DR 2-106, to promulgate fee schedules, using the State Minimum Fee Schedule Reports as a guide. *See* Virginia State Bar, Minimum Fee Schedule Report 3 (1969) (A. 25). Implicit in this reliance is the expectation that local associations will possess the flexibility to adjust the state-recommended fees to local circumstances. *Id.* Thus, Fairfax, attuned to local circumstances, promulgated its advisory fee schedule to facilitate the Supreme Court's, and therefore, the State Bar's regulation of fee practices.

In summary, provisions of the Canons of Ethics and Code of Professional Responsibility, approving minimum fee schedules, together with the Ethics Committee Opinions and the language of the Minimum Fee Schedule Reports issued by the State Bar, demonstrate that local bar associations, including Fairfax, have issued suggested fee schedules to facilitate compliance with and as an integral part of state regulatory requirements. The suggested fee schedules were the

result of and subject to a scheme of state regulation of lawyers' activities, including in particular fee practices, effectuated through supervision and regulation of lawyer members of the Virginia State Bar.

2. THE POLICY ESTABLISHED IN PARKER V. BROWN DICTATES THAT FEDERAL ANTITRUST ENFORCEMENT SHOULD YIELD TO CONFLICTING STATE REGULATION.

In *Parker* v. *Brown*, 317 U.S. 341, 350 (1943), a unanimous Supreme Court held that a program to regulate the marketing of raisins, proposed by private producers but adopted and enforced by a state agency, was the product of state action and therefore not subject to antitrust attack. The Court assumed at the outset of its Sherman Act analysis "that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." *Id.* at 350. The Court further assumed that Congress could have preempted the California regulation because of its effect on interstate commerce. The key to this Court's analysis lay in the fact that the prorate program was not a purely private undertaking.

> "It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is

not lightly to be attributed o Congress." *Id.* at 350-51.

Thus this Court held that the Sherman Act was not intended to apply to the prorate program, even though its organization was proposed by the private procedures. Significantly, "it . . . [was] the state, acting through the Commission, which adopt[ed] the program and which enforce[d] it with penal sanctions, in the execution of a governmental policy." *Id.* at 352.

In the instant case, the Commonwealth of Virginia, acting through the legislature, the Virginia Supreme Court, and the State Bar has determined that personal solicitation of business within the context of the legal profession has undesirable consequences for the public. Such solicitation is therefore proscribed by the Canons of Ethics and the Code of Professional Responsibility. Furthermore, the Commonwealth has determined that local minimum fee schedules are an appropriate means of regulating this ethics offense. Thus, the State Bar prompted local bar associations to promulgate advisory fee schedules, and lawyers who habitually undercut those schedules subject themselves to professional discipline. Fairfax's suggested fee schedule was thus occasioned by adherence to this state regulation of lawyers' activities.

In addition, the fee schedule was not intended to be effective in the absence of this state regulation. All authority to investigate and enforce the schedule rested in the State Bar and the Virginia Supreme Court. Thus, as in *Parker,* the state, acting through the State Bar and Supreme Court, urged and in effect necessitated local advisory fee schedules and "enforce[d] [them] with . . . sanctions, in the execution of a governmental policy." 317 U.S. at 352. In these circumstances, to hold that local promulgation of an advisory fee schedule violated the antitrust laws would sub-

ject these lawyers to contradictory legal standards. For precisely this reason, the *Parker* v. *Brown* doctrine establishes the priority that state regulation shall prevail.

Although a majority of the Fourth Circuit panel below recognized the dilemma faced by Virginia lawyers subject to conflicting regulatory demands, 497 F.2d at ....., the Court of Appeals applied the doctrine of *Parker* v. *Brown* too restrictively. In effect the Fourth Circuit held that challenged conduct, to be exempt under the doctrine of *Parker* v. *Brown,* must derive its authority and efficacy directly and specifically from a legislative command of the state. In addition, the Court of Appeals held that the activity must be subject to active, independent state supervision.

Although *Parker* was literally concerned with an explicit legislative command, the policy rationale of *Parker* applies with equal force to any valid state regulation, whether found in an express legislative directive or an administrative regulation issued pursuant to general legislative authorization. Lawyers in Virginia are legally obligated to comply with the Code of Professional Responsibility and the Ethics Committee Opinions of the Virginia State Bar just as surely as they are obligated to comply with an explicit and direct legislative command. To hold that the *Parker* doctrine does not apply here because the state regulation derives from general legislative authorization rather than a specific legislative command would defeat the purpose of the doctrine.

Contrary to the holding of the Court of Appeals, *Parker* v. *Brown* does not require "active, independent" state supervision of the challenged conduct.[12] Such language appears

[12] *See Washington Gas Light Co.* v. *Virginia Elec. and Power Co.,* 438 F.2d 248 (4th Cir. 1971); *Allstate Insurance Co.* v. *Lanier,* 361 F.2d 870 (4th Cir.), *cert. denied,* 385 U.S. 930 (1966).

nowhere in the *Parker* opinion. Rather, *Parker* holds that it is sufficient that the challenged conduct have been occasioned by adherence to state regulation. In any event, the mere fact that the State Bar happens to be run by lawyers does not affect its status as a governmental entity created by statute and authorized to regulate the conduct of lawyers in Virginia. Lawyers must comply with that regulation regardless of the State Bar's actual composition. Moreover, the Virginia Supreme Court, whose justices are unquestionably independent, is vested with ultimate supervisory responsibility for the conduct of lawyers in Virginia.

Therefore, all the elements of *Parker* immunity are present in the instant case. To maintain the necessary balance between federal antitrust enforcement and state regulation, *Parker* requires that the Sherman Act should in this case yield to Virginia's regulation of lawyers' fee practices as effectuated in the promulgation by Fairfax of a suggested schedule of fees.

D.

The Fairfax County Bar Association's Suggested Fee Schedule Does Not Constitute Price Fixing.

Even if the antitrust laws apply to the challenged conduct of Fairfax, a close examination of the facts will demonstrate no antitrust liability. First, the mere suggestion of appropriate prices for the lawful purpose of aiding compliance with state regulation, without more, does not constitute price fixing. Second, even if the suggested fee schedule is deemed price fixing, the presence of a regulatory scheme reflecting countervailing policy considerations and the uncertainty as to the competitive effects of bar association fee schedules warrant a rule of reason analysis rather than the cruder per se treatment.

1. FAIRFAX'S PROMULGATION OF AN ADVISORY FEE SCHEDULE SERVES A LEGITIMATE REGULATORY PURPOSE AND DOES NOT HAVE THE EFFECT OF FIXING PRICES.

The Supreme Court has held that exchange of price information among competitors that serves a legitimate purpose does not constitute price fixing. In *Maple Flooring Manufacturers Ass'n* v. *United States,* 268 U.S. 563 (1925), the defendant association had disseminated statistics on average production costs, freight rates, and prices. Noting that the availability of such information to members of the association would tend to produce price uniformity, the Court nevertheless held that § 1 had not been breached. Significantly for this case, the defendants had not agreed to use the information to fix prices, nor did the information exchange provide a basis of inferring such agreement. *Id.* at 586. Rather, the kinds of data provided there, like fee schedules, were "legitimate subjects of enquiry and knowledge . . . ." *Id.* at 585.

On the same day, this Court decided *Cement Manufacturers Protective Ass'n* v. *United States,* 268 U.S. 588 (1925). In that case the defendants had gathered and disseminated information as to production, selling prices on specific job contracts, and transportation costs. The defendants once again had not agreed to use this information for the purpose of fixing prices and each member was free to determine his own level of production and prices. Because this exchange of information served a legitimate purpose—prevention of fraud—rather than price-fixing objectives, the Court held that it did not violate § 1 of the Sherman Act.[13]

[13] Similarly, in *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933), this Court upheld a common sales agency plan even though it was assumed that actual operation of the plan might have some tendency to stabilize prices. Decisive was the absence of any showing that the defendants' plan contemplated or necessarily entailed control of prices.

Although this Court recently struck down a particular variety of price information exchange in *United States* v. *Container Corp.*, 393 U.S. 333 (1969), this Court distinguished *Cement Manufacturers:*

> "While there was present here, as in *Cement Mfrs.* . . ., an exchange of prices to specific customers, there was absent the controlling circumstance, *viz.*, that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job." *Id.* at 335.

Thus *Container* holds that an exchange of price information not intended to fix prices and having a legitimate purpose does not constitute unlawful price fixing.

Lower court decisions, relying upon the *Container* distinction of *Cement Manufacturers,* have held that the Sherman Act does not prohibit communications as to price between competitors for the purpose of establishing the meeting competition defense provided in the Robinson-Patman Act. In *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), for example, competitors had engaged in price verification communications with a view toward establishing the meeting-competition defense. Although the court recognized that this exchange of pricing information "len[t] itself easily to concerted price fixing activities and to an unconscious direct retardation of the downward trend of prices," it held that the purpose to comply with the Robinson-Patman Act was a "controlling circumstance" making the information exchange legitimate under the antitrust laws. *Accord, Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973); *Webster* v. *Sinclair Refining Co.*, 338 F.Supp. 248 (S.D. Ala 1971).

There exists in the instant case a circumstance no less compelling and controlling. Fairfax's suggested fee schedule was not intended to fix fees but merely to provide information to member lawyers to help them comply with ethical regulation by the Virginia State Bar. More specifically, the schedule sought to advise members of Fairfax as to the fees "customarily charged in the locality for similar services." Virginia Code of Professional Responsibility, DR 2-106(B)(3), Findings of Fact 13, Ad. 4-5; Canon 12 of the Canons of Ethics, Findings of Fact 13, Ad. 2-3. Habitually charging less than such fees can constitute prima facie evidence of the ethics offense of personal solicitation. Virginia State Bar Opinions Nos. 98 and 170 (A. 45, 47).

The statement of purpose of the Fairfax advisory fee schedule makes clear that the schedule was advisory only.

> *"This schedule of proposed minimum fees is advisory only and is intended to be applied as a guide in determining the conduct of the local bar as to what should be charged as a minimum under the circumstances. . . . In all cases, the individual lawyer has the responsibility of determining a proper fee under all circumstances.* There is no intention to require that the individual lawyer should use this schedule as a means of avoiding his ultimate responsibility to fix a fair and reasonable fee considering all of the circumstances of a particular case.
>
> * * *
>
> Each lawyer must establish his own fees and the suggested minimum fee schedule set forth herein is to be used by lawyers as a guideline in appropriate cases. This document is not intended and should never be used to replace the individual discretion of attorneys to set their fees depending upon the particular circumstances of each particular case." (A. 38, 39) (emphasis added).

All Virginia lawyers are constrained by the Code of Professional Responsibility to look at the fee customarily charged in their locality for similar legal services only as *one* of eight factors to be considered as guides in determining the reasonableness of a fee. *See* Virginia Code of Professional Responsibility, DR 2-106, Findings of Fact 13, Ad. 4-5; Virginia State Bar Opinion No. 170 (A. 47).

Thus it can only be concluded that the schedule was merely advisory and that members of Fairfax did not agree to fix fees. Rather, the schedule was promulgated, not for purposes of price fixing, but merely as an integral component of state regulation. In view of this legitimate regulatory purpose and the absence of any agreement or intent to fix prices, the schedule should not be treated as price fixing.[14]

Moreover, not only was there no intention or agreement on the part of Fairfax to fix fees, promulgation of the advisory fee schedule did not have that effect. The schedule was not consistently adhered to by members of the Association. Findings of Fact 18, 21, Ad. 5. F. Shield McCandlish, an attorney with great experience in real estate settlements, testified that of the total of 620 transactions closed by his firm in Reston, Virginia, within the last four years, the schedule fee was not charged in nearly 400 cases. (A. 97). Even when the schedule fee was charged, it was only after an evaluation of its fairness, the status of the purchaser, the source of payment, and recent similar transactions. (A. 105-07). Thus in no case was a suggested fee charged *qua* minimum fee.

John T. Hazel, Jr., another attorney in northern Virginia, testified that he made no reference to the advisory fee

[14] *Cf. United States* v. *Container Corp.*, 393 U.S. 333 (1969); *Board of Trade* v. *United States*, 246 U.S. 231 (1918).

schedule in his practice and that his firm did so only occasionally. (A. 112). Joseph T. Duvall, President of the Fairfax Bar Association, stated that the fee schedule was widely regarded as advisory, primarily for the benefit of young lawyers and retired government lawyers who might be unacquainted with reasonable fees in northern Virginia. Mr. Duvall stated that he himself did not adhere to the fee schedule and that his firm charged both more and less than the schedule depending upon the nature of services rendered in real estate transactions. (A. 118, 120).

Thus the evidence presented below demonstrated that the fee schedule was regarded as advisory and that non-adherence was the pattern in northern Virginia. The sole evidence presented by Petitioners on the question took the form of inquiries placed to 35 lawyers. Each lawyer was asked by letter to quote his fee for handling a real estate closing involving an unspecified amount. Some 19 replied that their fees were in general the same as that quoted in the fee schedule. Without information necessary to utilize the seven other factors listed by the Canons of Ethics and the Code of Professional Responsibility, those lawyers, in order to be responsive, were limited to an assessment based on the only known factor—the suggested fee schedule. The fees quoted might well have been different had the Goldfarbs personally interviewed each lawyer. Moreover, Petitioners neither attempted to discover the nature of fees charged by those who did not respond to the mass solicitation, nor in connection with one letter, from Mr. King, did they respond to a proffered invitation to consult the law firm to determine its fee. (A. 94-95).

Finally, Fairfax never attempted to circulate its advisory fee schedule to its members. Fairfax made it available at the courthouse for those lawyers who wished to have it, but no

effort was made to distribute it among the membership. (A. 119-20).

Thus it is clear that Fairfax's fee schedule was neither intended nor used to fix fees. There was no showing at the trial court level that price fixing was contemplated or that the fee schedule entailed control of fees. Indeed, the lower court found that there was no evidence of any effect on fee levels whatever. Findings of Fact 54, Ad. 16. Therefore, Fairfax did not engage in price fixing.

United States v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950), which held that a standard rate schedule of commissions constituted price fixing, may be distinguished from the case at bar. In *Real Estate Boards* the association's code of ethics provided: "Brokers *should* maintain the standard rates of commission adopted by the Board and *no* business should be solicited at lower rates." (emphasis added). All members of the association agreed to abide by the code.

Fairfax expressly admonished its members that the schedule *should not* supplant individual judgment in the setting of fees for legal services. No Fairfax members agreed to adhere to the advisory fee schedule, nor did they generally adhere to it in practice. The schedule was merely used as one element among several to be considered in determining a reasonable fee and to aid lawyers in avoiding the ethics offense of personal solicitation.

In summary, the fee schedule was merely advisory, it served a legitimate regulatory purpose, and it had no effect of fixing fees. Therefore, the promulgation of a schedule of suggested fees is not price fixing under the standards of this Court.

2. THE ADVISORY FEE SCHEDULE, EVEN IF CHARACTERIZED AS PRICE FIXING, DOES NOT CONSTITUTE A PER SE VIOLATION OF THE SHERMAN ACT.

Under ordinary circumstances price fixing is of course illegal per se. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Courts have, however, carved out two categories of exception to the general per se treatment accorded practices such as price fixing, group boycotts, and the like. First, the rule of reason and not the per se rule should be utilized in deciding a novel and complex antitrust question concerning an important sector of the economy. Second, the per se rule should yield to the rule of reason in cases involving the interaction of regulation with antitrust enforcement.

In *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), this Court refused to invoke the per se rule in connection with a vertical territorial limitation. This Court's rationale for its holding is particularly pertinent to the case at bar:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain [whether they are naked restraints of trade with no purpose except stifling of competition]. . . . We need to know more than we do about the actual impact of those arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classified as per se violations of the Sherman Act." *Id.* at 263.

Recently, the Eighth Circuit followed *White Motor* in holding that an alleged group boycott, ordinarily a per se violation of § 1 of the Sherman Act, should be judged according to the rule of reason in the context of the bank

credit card business. *See Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974). The plaintiff argued that *White Motor* referred only to a distinction between horizontal territorial and customer restrictions, on the one hand, and vertical restrictions on the other. The court rejected this argument saying that "the novelty and importance of the question [in *White Motor*] was the determining factor in applying the rule of reason rather than the fact that a vertical rather than a horizontal restraint was imposed." *Id.* at 126. Because of the relative newness and importance of the bank credit card industry, the "lack of definitive information relating to competition therein", and the novelty of the question, the court rejected the rigid per se approach.[15] *Id.* at 129-30. *Accord, Carlson Companies, Inc.* v. *Sperry and Hutchinson Co.*, 374 F.Supp. 1080 (D.Minn. 1973).

The *White Motor* rationale applies to the case at bar. Until the district court decision in this case, no court had ever applied the antitrust laws in the context of the legal profession. Such enforcement may well have unforeseeable and undesirable consequences, for the benefits ordinarily accruing from completely unregulated price competition do not necessarily follow in the market for professional services. Conventional economic theory, which holds that competition tends to produce good quality at the optimum price, may not apply in a market for legal services. The average client cannot rationally evaluate the quality of legal services. He has no way of knowing, for example, whether one title examination or will is better than another—at least for a very long period of time. He may, for example, irrationally

[15] Interestingly, in that case, the Antitrust Division offered a brief *amicus curiae* urging the court's adoption of the rule of reason.

equate an adverse court decision with poor legal services. Having no way of judging the quality of the services he seeks, he will likely go to the lowest bidder regardless of the competence of that bidder. In addition, entry into the legal market is closely regulated by educational requirements and state licensing requirements. Thus the supply of lawyers is not necessarily responsive to changing market conditions. In the absence of fee schedules, clients will have extreme difficulty in obtaining price information, since personal advertising is and always has been prohibited by the Canons of Ethics and the Code of Professional Responsibility.

Thus unbridled competition in the legal market, rather than benefitting the public, may well lead to reduced quality of legal services. As important as those services are in our society, this cannot be tolerated. Not only do economic gains and losses hang in the balance, but the rights of individuals are at stake. Competent professionals are needed to protect and defend individual rights and peacefully resolve economic and social disputes.

The inflexible per se rule applied by the trial court would not permit these adverse effects to be considered. By contrast, a rule of reason analysis would entail exploration of the economic effects of, and policy justifications for, fee schedules within the context of the legal profession to determine rationally whether they unreasonably restrain trade. Where, as here, the effect of a per se rule would be unpredictable because of lack of experience with unfettered competition in the profession, application of the per se rule against recommended fee schedules is inappropriate.

The per se rule should not apply to the suggested fee schedules for still another reason. In *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), this Court applied the rule of reason to a group boycott, otherwise a per se viola-

tion, since the challenged boycott occurred in the context of a federally authorized scheme of self-regulation. The Court reasoned that the normal strictures of the antitrust laws may be appropriately modified when the challenged practices are supported by "justification derived from the policy of another statute or otherwise . . . ." *Id.* at 348-49.

> "[U]nder the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." *Id.* at 360.

A district court has applied the rule of reason to price fixing agreements used for a self-regulatory purpose under the circumstances of the investment banking business. *United States* v. *Morgan,* 118 F. Supp. 621, 687-90 (S.D.N.Y. 1953).[16]

The Fairfax fee schedule should likewise be evaluated under the rule of reason, since it embodies the policy of a state regulatory program. Presumably, the states have a rational basis for sanctioning, and in some cases compelling, minimum fee schedules within the context of the legal profession. If the doctrine of *Parker* v. *Brown* does not apply here, the rule of reason is needed to provide a smooth interface between state regulation and antitrust enforcement. Otherwise, the antitrust laws will have the practical effect of negating state regulation of the profession, regardless of the beneficial purposes and effects of that regulation. Unless a rule of reason approach is adopted, the legal profession will be forced to respond to the imperatives of profit maxi-

[16] *See also United States* v. *New York Coffee and Sugar Exch., Inc.,* 263 U.S. 611 (1924); *Prairie Farmer Publishing Co.* v. *Indiana Farmer's Guide Publishing Co.,* 88 F.2d 979 (7th Cir.), *cert. denied,* 301 U.S. 696 (1937).

mization alone. The antitrust laws should not, and do not, command such a result.

In summary, it is not necessary to jam the novel situation at issue here into conventional antitrust categories. Rather, because the case is truly one of first impression and involves inconsistencies with state regulation and professional self-regulation, this Court should avoid a simplistic, mechanical approach to the problem, as it felt bound to do in *White Motor* and *Silver*.

E.

A Decision Adverse To Fairfax Should Be Applied Only Prospectively To Avoid The Manifest Unfairness Of Subjecting Lawyers Retroactively To Unforeseeable And Unpredictable Legal Standards.

Should this Court hold that Fairfax's fee schedule violated § 1 of the Sherman Act, that decision should not be applied retroactively. Otherwise, Fairfax will be penalized for facilitating state regulation of the legal profession, obeying the ethical standards commonly held to apply to lawyers, and finally for relying on the statements of this Court and other courts that the legal profession was outside the scope of the Sherman Act. Imposing treble damages liability upon these lawyers, who at all times acted in good faith in the belief that the fee schedule was ethical and lawful, indeed, required, would be grossly unfair and manifestly unnecessary.[17]

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[17] Petitioners object that Fairfax did not raise the non-retroactivity argument until after trial. That should not preclude consideration of the argument by this court. Obviously, the point was not raised during the trial because it would have been inappropriate, illogical and untimely to do so. In any event, the trial court and counsel for Petitioners had ample opportunity to consider and comment upon Fairfax's contentions made both by formal motion and explored in oral argument. Moreover, all evidence relied upon by Fairfax was introduced within the course of the trial and thus came as no surprise to Petitioners.

In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), this Court listed three separate considerations for determining whether a civil decision should be applied nonretroactively.[18] First, "the decision . . . must establish a new principle of law, *either* by overruling clear past precedent on which litigants may have relied . . ., *or* by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." Second, a court should look "to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retart its operation." Third, a court should weigh "the inequity imposed by retroactive application. . . ." 404 U.S. 106-07 (emphasis added). All of the *Chevron* criteria are met in this case.

A decision that suggested fee schedules promulgated by local bar associations are subject to the antitrust laws would establish new principles of law. This Court would then have decided "issue[s] of first impression" both by declining to follow its earlier clear statements on the subject of the learned profession, and by resolving the other issues in this case, never before tested, "whose resolution [was] not

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In any event, the argument should still be carefully considered to avoid the substantial injustice that would otherwise result. *See Hormel* v. *Helvering,* 312 U.S. 552 (1941); *Dudley* v. *Inland Mutual Insurance Co.,* 299 F.2d 637 (4th Cir. 1962). Indeed, if deemed necessary to reach the correct result, an appellate court may *sua sponte* consider points not presented to the district court and not even raised on appeal by any party. *See, e.g., United States* v. *Continental Can Co.,* 378 U.S. 441, 457, 470 (1964). The importance of the present case is too great in terms of its potential devasting impact on bar associations across the country for this Court to make a determination without consideration of the nonretroactivity point.

[18] Although *Chevron* was not an antitrust decision, the Court obviously intended the criteria to be of general application to civil cases. Indeed, lower courts have subsequently relied extensively upon the *Chevron* criteria in a variety of factual contexts, including the antitrust area. *See, e.g., Bendix* v. *Balax, Inc.,* 471 F.2d 149, 155 (7th Cir. 1972), *cert. denied,* 414 U.S. 819 (1973).

clearly foreshadowed." Until this case, no court had ever faced the general question whether advisory fee schedules adopted by bar associations transgress the Sherman Act. More specifically, until this case no court had ever decided the following issues:

(1) whether a fee schedule adopted and used only by members of a county bar association meets the interstate commerce requirement of the Sherman Act;

(2) whether the doctrine of *Parker* v. *Brown* protects a fee schedule adopted by a bar association in fulfillment of valid state regulation; and

(3) whether a mere advisory fee schedule, adopted by a bar association for legitimate reasons only, constitutes price fixing violative of the Sherman Act.

As demonstrated above, there was ample precedent to the effect that the Sherman Act did not reach the learned profession at all.

Thus, since the inception of the Sherman Act, members of the legal profession have logically assumed on a number of grounds that advisory fee schedules were not unlawful under the antitrust laws. At least thirty-four states and hundreds of local bar associations have promulgated such schedules. *See, e.g.,* Stip. 26, Ad. 18. Advisory fee schedules have been contemplated and approved by the Canons of Ethics and the Code of Professional Responsibility. Numerous state court decisions have approved the use of minimum fee schedules as persuasive evidence of a reasonable fee.[19] Indeed, in these cases the judges themselves referred

[19] *See, e.g., Junker* v. *Junker,* 188 Neb. 555, 198 N.W.2d 189 (1972); *State ex rel. Baker* v. *County Court,* 29 Wis. 2d 1, 138 N.W.2d 162 (1965); *Buckles* v. *Continental Cas. Co.,* 197 Ore. 128, 252 P.2d 184 (1953); *Succession of Weil,* 205 La. 214, 17 So.2d 255 (1944); *Broughton* v. *Nance,* 244 Ala. 499, 14 So.2d 505 (1943); *Cox* v. *State Ind. Accident Comm.;* 168 Ore. 508, 123 P.2d 800 (1942).

to such schedules to help them determine the amount of attorneys' fees to award.

Moreover, the absence of any litigation whatsoever until the present suit is indicative of the prevalent view that such schedules were lawful. Clearly, then, attorneys all across the country must have believed in good faith that advisory fee schedules did not violate the antitrust laws. This fact in itself indicates that, at the very least, it was not "clearly foreshadowed" that bar associations' advisory fee schedules would some day be declared unlawful.

Indeed, attorneys had ample justification provided by this Court for believing that such schedules were wholly legitimate. As stated in the learned professional section of this brief, Supreme Court decisions in *FTC* v. *Raladam Co.,* 283 U.S. 643 (1931), and *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427 (1932), clearly established that the term "trade," as used in the Sherman Act, does not include the "learned professions." Other cases in this Court echoed and re-echoed that theme. In the 43 years since *Atlantic Cleaners,* this Court has never changed this position. Lawyers were thus entitled to assume that they practiced a learned profession and to rely upon this fabric of Supreme Court decision.

A recent decision of this Court argues strongly for prospective decision in this case, should this Court reverse the Fourth Circuit. In *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973), the defendants had relied upon a statute subsequently found to unconstitutional. Although this Court struck down the statute, it refused to apply its decision retroactively, saying:

> "That there would be constitutional attack on Act 109 was plain from the outset. But this was not a case where it could be said that appellees acted in bad faith

> or that they relied upon a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of Lemon I could be predicted with assurance sufficient to undermine appellees' reliance on Act 109." *Id.* at 207.

The resolution of the professional exemption question in the instant case was even less "clearly foreshadowed" than the unconstitutionality of the statute in *Lemon*. In the latter case lower courts had split on the question involved. In the instant case, however, all precedent, until very recently, supported the learned profession exemption from the antitrust laws.

Attorneys also were justified in thinking that local bar activities did not sufficiently affect interstate commerce so as to come within the Sherman Act, and that advisory schedule did not constitute price fixing. For these very reasons, in what must be an embarrassment to the Solicitor General in his *amicus* role in this case, the Justice Department had never even brought a suit challenging an advisory fee schedule until its recent action against the Oregon State Bar.

Furthermore, on two separate occasions in recent years, the Department of Justice officially sanctioned the use of advisory fee schedules in Fairfax County. In response to an inquiry from the Arlington County Bar Association, as to the predecessor of the fee schedule in issue in this case, an Assistant Attorney General of the Antitrust Division of the Department of Justice advised in 1961: "The Antitrust Division has *never* taken the position in the past that advisory minimum fee schedules established by Bar Association were subject to prosecution under the federal antitrust laws." (emphasis added). He went on to say that the Department's position was based upon the fact that local bar ac-

tivities were not " 'in commerce' " and did not appear to have a significant 'affect' [sic] upon interstate commerce," and the fact that the fee schedules "were not agreed upon as to the amounts to be charged, but were advisory only." (A. 49). In 1965, Donald F. Turner, Acting Assistant Attorney General in charge of the Antitrust Division, reiterated the Department's position that mere advisory fee schedules were not subject to antitrust challenge. (A. 54). Surely no more justifiable basis for reliance could exist than that the antitrust prosecutors sanctioned the use of advisory fee schedules, not once in recent years, but twice, and without reservation.

Lawyers further assumed that, since the Canons of Ethics, the Code of Professional Responsibility, and state regulation of professional ethics sanctioned and approved the use of minimum fee schedules, adoption of such schedules could not conceivably violate the federal antitrust laws. Certainly, a contrary result was not "clearly foreshadowed."

The second *Chevron* criterion for nonretroactive decision is also clearly satisfied in this case. The imposition of treble damages upon Fairfax would not advance the purpose of a rule declaring advisory fee schedules in violation of the Sherman Act. The obvious purpose of such a rule would be to eliminate the promulgation and use of such schedules. This purpose would be easily accomplished without the imposition of damages for a retroactive violation of the rule. Fairfax has already rescinded its schedule. Damages, of course, are imposed to deter others from violating the law as determined by courts. Surely, the imposition of civil penalties for acts considered lawful when performed is no deterrent at all. Moreover, a decision in the instant case would be directed at lawyers—men and women who

have sworn to uphold federal and state law. Unquestionably, imposition of treble damages upon Fairfax would be completely unnecessary to effect general deterrence among lawyers. Such an imposition would serve only to punish for punishment's sake, without serving any remedial purpose.

Finally, in view of the prevalent, good-faith belief among lawyers that advisory fee schedules did not violate the antitrust laws, retroactive application of this decision would impose substantial inequity upon every lawyer in the United States. Retroactive application would mean that hundreds of local bar associations would be subject to potentially ruinous treble damages liability for activities thought to be perfectly legal, indeed approved by authoritative regulatory bodies. Mere membership in a bar association that had issued a fee schedule might well lead to a place on the list of defendants in a class action suit. For example, in the instant case, an award of treble damages would more than wipe out the assets of Fairfax, and if in subsequent litigation personal liability were to be extended to individual members of Fairfax, the award could conceivably destroy the livelihoods of many members.

Prospective application would avoid the gross unfairness, preserve and advance the rule Petitioners seek to establish, and constitute a rational method of establishing a revolutionary policy. If this Court is to overturn the long and well established practice of an entire profession in this case, it should not at the same time open the floodgates of ruinous litigation against every lawyer in the country. Prospective application—if lawyers' advisory fee schedules do violate the Sherman Act—is the only means in this case to serve the ends of justice.

VI.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed as clearly correct and based upon sound principles of law and policy.

Respectfully submitted,

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January 31, 1975

ADDENDUM

CONTENTS

This Addendum includes (1) the Findings of Fact proposed by Fairfax and adopted by the District Court below, and (2) those Stipulations of the Parties most pertinent to the argument in this Brief. Other Findings of Fact adopted by the District Court, including those proposed by Petitioners and the Virginia State Bar, and the complete Stipulations of the Parties are reproduced in the Appendix to the Petition for a Writ of Certiorari filed in this appeal on August 5, 1974.

PROPOSED FINDINGS OF FACT BY THE DEFENDANT FAIRFAX BAR ASSOCIATION ADOPTED BY THE COURT

(6) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia contemplate and approve suggested or advisory fee schedules. (See Canon 12 and Rules for Integration of the Virginia State Bar, Part 6 II EC 2-18, DR2-106.)

(9) Under the Canons of Ethics and the Code of Professional Responsibility, as promulgated by the Supreme Court of Virginia and the American Bar Association, it is unethical conduct for an attorney either to fix legal fees based solely on the recommended fees contained in an advisory minimum fee schedule without regard to other relevant factors, or, for the purpose of soliciting business, consistently to charge fees below the recommended fees. Neither the Virginia State Bar nor any of its district committees has ever received any complaint regarding either type of unethical conduct. Neither has the Virginia State Bar nor any of its district committees ever initiated or participated in any administrative or judicial action against an attorney for having engaged in either type of unethical conduct described above. (Trial Testimony) (See American Bar Association Formal Opinion 20, dated May 5, 1930; American Bar Association Formal Opinion 171, dated July 23, 1937; American Bar Association Formal Opinion 323, dated August 9, 1970.)

(10) The Virginia State Bar is authorized by the Supreme Court of Virginia to render advisory opinions on any question of contemplated professional conduct. Pursuant to this authority, the Virginia State Bar issued Opinions 98 and 170 which affirm the propriety of advisory or suggested fee schedules. (See Stipulation of Facts and Opinions 98 and 170.)

(11) In 1969 and on previous occasions, the Virginia State Bar has published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. (Trial Testimony)

(12) The following statement appeared on page 3 of the Minimum Fee Schedule Report published in 1969 by the Virginia State Bar:

> "The recommended minimum fee figures in the committee's report represent the consensus recommendation of members of the committee as to fees which should be assessed in 1969 for the legal services indicated."

Further, on page 11 of the Minimum Fee Schedule Report published by the Virginia State Bar in 1969, it is recommended that the fee for title examination be one percent of the first $50,000 of the loan amount or purchase price and one half of one percent of the loan amount or purchase price from $50,000 to $250,000. These provisions are essentially identical to the advisory information contained in the Minimum Fee Schedule promulgated by the Fairfax Bar Association.

(13) The Canons of Ethics and the Code of Professional Responsibility promulgated by the Supreme Court of Virginia state that, in determining charges for title examination and certification, it is proper to consider a minimum fee schedule or the fee customarily charged in the community for such services.

Canon 12

> "In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those

which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

"In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

Ad. 4

Code of Professional Responsibility
EC 2-18

"The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family."

DR 2-106

(A) A lawyer shall not enter an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required , the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other emloyment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(18) Numerous attorneys who are members of the Fairfax Bar Association have charged fees for title examination different from those suggested in the Minimum Fee Schedule. (Trial Testimony)

(20) Defendant Fairfax Bar Association has never investigated, communicated with or imposed sanctions upon any member or any other licensed attorney for failing to adhere to any minimum fee schedule. Further, defendant Fairfax Bar Association has never induced or attempted to induce any other person or organization to investigate, communicate with or impose sanctions upon any member of Fairfax Bar Association or any other licensed attorney for failure to adhere to any minimum fee schedule. (Trial Testimony)

(21) Attorneys who have handled many of the real estate closings in Reston, Virginia have not rigidly adhered to the Minimum Fee Schedule promulgated by the Fairfax Bar Association. (Trial Testimony)

(24) Mr. and Mrs. Goldfarb were residing within the Commonwealth of Virginia at the time they contracted to

purchase their home in Reston, Virginia. (Trial Testimony)

(25) Both the builder who constructed the home in Reston, Virginia purchased by Mr. and Mrs. Goldfarb and the real estate agent through whom they purchased are and were located in Reston, Virginia. (Trial Testimony)

(28) All of the acts performed by A. Burke Hertz in connection with the examination and certification of the title of the land in Reston, Virginia purchased by Mr. and Mrs. Goldfarb were performed within the Commonwealth of Virginia. (Trial Testimony)

(29) All transactions relating to the purchase by Mr. and Mrs. Goldfarb of their home in Reston, Virginia, including the negotiation for sale, contract of sale, title examination, securing of mortgage loan, settlement and all legal services, occurred within the Commonwealth of Virginia. (Trial Testimony)

(33) The purpose of a title examination and certification is to assure the purchaser of real estate that the land he is purchasing will not be subject to future claims as a result of past actions by prior owners. A title examination and certification assures the purchaser of real estate the free and unemcumbered use and enjoyment of his land. (Trial Testimony)

(34) The duties and responsibilities of an attorney in connection with a residential real estate transfer in Reston, Virginia include the following:

(a) Initial telephone conversations and correspondence concerning general procedures and costs.

(b) Reading contract and any correspondence associated with it.

(c) Opening file and cross indexing under seller, purchaser, lender and property.

(d) Checking on past surveyor for possible recertification.

(e) Ordering house location survey.

(f) Checking on possible reissue rates on existing title insurance policies.

(g) Examination of title (more fully described in Findings Nos. 35 and 37 *infra.*).

(h) Writing for pay-off figures and determining existing trust holders.

(i) Preparation of application for title insurance binder.

(j) Transmitting application to title insurance company.

(k) Forwarding title binder to lender.

(l) Miscellaneous telephone calls relating to fire insurance, title insurance, closing costs, payment of taxes, getting termite certification, closing procedures and order, etc.

(m) Coordination of settlement date and time with lender, agent, seller, purchaser, other attorneys.

(n) Quoting verbal closing costs to seller, purchaser, agent and lender.

(o) Preparation of settlement documents—deed, note, deed of trust, settlement statements, transmittal letters.

(p) Computing settlement statements.

(q) Fulfilling all conditions of sales contract.

(r) Completing truth in lending form and other forms required by lender.

(s) Preparation of disbursement statement.

(t) Attorney review title and file for settlement. (More fully described in Findings Nos. 35 and 37 *infra.*)

(u) Submitting documents to lender, purchaser, or another attorney for review prior to settlement.

(v) Conducting settlement(s).

(w) Sending all required papers to lender.

(x) Depositing funds.

(y) Preparation of documents for recording, including notarizing, blue-backing, initialing. (More fully described in Findings Nos. 35 and 37 *infra.*)

(z) Bring-down title. (More fully described in Findings Nos. 35 and 37 *infra.*)

(aa) Recording papers.

(bb) Writing disbursement checks.

(cc) Forwarding disbursement checks.

(dd) Preparation of Deeds of Release.

(ee) Preparation of notes for marginal release.

(ff) Releasing notes on margin of land records.

(gg) Sending Deeds of Release to Trustees.

(hh) Recording Releases.

(ii) Conforming file copies of settlement documents with recording information.

(jj) Preparation of final title insurance policy application.

(kk) Preparation of Certificates of Title.

(ll) Forwarding final title insurance applications, then policies, all recorded documents to proper parties.

(mm) Final review of file for closing.

(nn) Closing and filing of file.

(35) In the course of examining and certifying a title to real estate, an attorney in Virginia must perform at least the following steps:

(A) A search of the grantor and grantee indices for at least a sixty year period. Each index covers approximately a ten year period. Therefore, to perform a sixty year search, six to eight indices must be thoroughly examined. In Fairfax County, a search of the "land book" is also required in order to ascertain the assessed value to the landowner as of January 1.

(B) After a chain of owners is established from a search of the grantor and grantee indices for sixty years, a complete check must be made for each of these owners (known as "abstracting the title chain") on all deeds, deeds of trust, deeds of release, homestead deeds, mortgages, powers of attorney, leases, notices of *lis pendens,* mechanics' liens, chancery suits to enforce mechanics' liens, etc. All of these items might be recorded in several deed books or in a single deed book, depending upon the jurisdiction. In Fairfax County there are separate deed books for the aforementioned items.

In making a complete check of all the owners in the chain of title, care must be taken to note for each owner the type of deed, its date, the date of recording, the consideration involved, the complete description of the land, the easements, rights of way, restrictive covenance an other impediments to the free and unencumbered use of the land and whether legal requirements for signature and notarization were met in all cases. Any suggestion of a possible interference with

the free and unencumbered use of the land by the new purchaser must be noted on the abstract and evaluated by the attorney.

If the parcel of land in question derives from a larger tract of land, a plat of the original land with all its divisions must be drawn or obtained by the attorney. This task may involve converting a "metes and bounds" description usually written in terms of rods, chains, degrees, perches, acres or other measurements, into feet or to a subdivision reference of lot, block and section.

In the event that a former owner in the chain of title was one who transferred a great deal of property, each deed from that owner must be located and read to determine whether the specific property involved in the current sale was, in fact, included in an earlier deed. Where similar names occur or names have been changed, as when women marry, this might well involve reading a very large number of deeds.

(C) Often, estates and inheritances of the property appear in the chain of title. In this event, the Will Index and docket records must be checked to determine whether any flaws existed in property transfers of this sort.

(D) In all cases it is necessary to check the Judgment Lien Indices in order to discover whether any judgments are outstanding against the property. In Fairfax County, there are four sets of indices of judgments to be searched. The indexed judgments must then be checked against the judgment lien docket to determine whether the judgments indexed have been satisfied. For Reston, that must be done daily for numerous subsidiary corporations of Gulf Reston, Inc., all of which hold title to property in Reston.

(E) In Fairfax it is also necessary to check the index of financing statements on household fixtures in order to deter-

mine whether unsatisfied financing statements exist. In Fairfax County, this entails checking two sets of indices.

(F) In the event subdivision plans are involved, plat or map books must be consulted for subdivision plans not recorded in deed books. Plat books should also be checked for easements and building restrictions on the property.

(G) Oftentimes, corporate owners appear in the chain of title. In this event, questions of corporate law may arise. For example, if the sale of land included all or substantially all of the assets of the corporation which were not sold in the regular course of business, then stockholders' consent to the sale must be located and verified. In addition, in some cases, verification of the name of the officers who executed a corporate deed must be obtained from the State Corporation Commission and a check should also be made to determine whether the corporate grantor is still in existence.

(H) In all cases, federal, state, county and town or city tax records must be checked to establish whether any unpaid taxes exist as a possible lien against the property. There are several sources for this information. First, a check must be made with the Treasurer or Commissioner of Revenue to obtain information on local real estate taxes. Attorneys must be particularly careful in this area as real estate taxes in Fairfax County are payable twice a year and reassessments are frequent.

In the event that a former owner in the chain of title is an estate, the executor of an estate should personally give an affidavit to the effect that all federal estate and gift taxes and Virginia inheritnce taxes are paid or nonassessable.

(I) The possible bankruptcy of any former owner in the chain of title should be checked. This information may be found in the grantor index under the name of the bankrupt

former owner. However, this information need not be recorded there and it is also necessary to check the Federal District Court recods.

(J) In addition to all of the foregoing, it is sometimes necessary to check additional records such as alimony and child support decrees, special commissioner deeds, and judicial sale records.

Once all of the foregoing steps are completed, an attorney must review his findings and evaluate all possible defects noted in the chain of title. (Trial Testimony.)

(36) While a title examination in Reston generally involves the steps outlined in Finding No. 35, factors peculiar to the Reston property further complicate the procedure. These factors include:

(a) Complex financing and transfer arrangements involved in the original transaction creating Reston, including a conveyance with a leaseback and both an option and an obligation to repurchase.

(b) The existence of numerous corporate subsidiaries of Gulf Reston, Inc. set up, in part, for the purpose of holding title to various parcels in Reston.

(c) The very large number of real estate transactions occurring in Reston on a daily and weekly basis. (Trial Testimony.)

(37) Because of the peculiar nature of Reston, the following specific steps are often followed on a daily basis in connection with the examination and certification of a title to property in Reston.

(a) The grantor and grantee indices must be checked daily and all entries added to the grantor and grantee conveyance list for Gulf Reston, Inc., John Hancock Mutual

Life Insurance Company, Belwood, Inc., Bonres, Inc., Bonner Reston Associates, Pignolia, Inc., the Ryland Group, Inc. and Teeshot, Inc., and this must also be done for several other corporations at less frequent intervals. This same procedure must also be followed for all unindexed instruments.

(b) After obtaining deed book and page references, the recorded instrument is examined and either abstracted or conformed or copies made. If these are extremely lengthy orders, copies are obtained from the Clerk's office at the cost of $1.00 per page.

(c) When rights of way and easements, etc. are recorded referring to the original 6,000 plus acres comprising Reston, it is necessary to determine which of the original acreage parcels is affected. Then it is necessary to determine whether the property is presently subdivided and dedicated as a section including the many resubdivisions. This will provide an up to date record of which easements and rights of way affect any area or property in Reston.

(d) Instruments such as Gulf repurchase deeds and plats, subdivisions, easement agreements, etc. are reviewed for recording. Also a comparison is made of the metes and bounds description with courses and distances on the plat to ascertain that there are no discrepancies between the two.

(e) Unrecorded instruments furnished by Gulf Reston, Inc., Vepco, C & P Telephone, Reston Transmission, etc. are checked as to each parcel or lot being examined.

(f) Each subdivision section is broken down into blocks and block lists (as to lot) and checked against grantor list to see that the duplicate lot numbers are not recorded. If errors are found, attorney who recorded the erroneous description is notified and asked to correct same.

(g) Answer any questions as to recording data, etc. requested by Reston Engineering Department.

(h) When recording deeds and deeds of trust in the individual owner after closing, the grantor list is checked again, judgments in four different sets of judgment records are checked again and unindexed instruments in as many as four different places are also rechecked. Next, it is usually necessary to wait in line to record. Once this is accomplished, it is necessary to conform copies as to instrument number, time of recording and deed book and page numbers.

If judgment such as Internal Revenue Service, maintenance and support, etc. or any other problems are discovered, the responsible attorney must consider and determine whether the instrument can be recorded or whether the problem must first be resolved. The Gulf Reston, Inc., Palindrone Corporation and Reston, Va., Inc. lists must be checked and rechecked on every piece or parcel of property being examined up to the minute of recording as they reserve the right to grant subsequent rights of way. This also applies to each resale from one individual to another. Similarly, the Gulf Reston, Inc. record must always be rundown as though they were still the owner.

For each plat, including all notations of any type, rights of way, resubdivisions, easement agreements, etc. must be checked as to each lot or parcel.

(i) It may be necessary to conform copies in various "section files" and update title front sheets in subdivision and individual lot files.

(j) The recording deeds of dedication, resubdivisions, etc. is time consuming as it is necessary to go to the Massey Building (County Office Building in Fairfax) to accomplish the following:

(1) Each dedication must be approved by the county attorney's office on the 11th floor;

(2) Pick up the approved plat from the 7th floor;

(3) Pay any unpaid fees—7th floor;

(4) Return to the Clerk's office at the courthouse, check wach list and entry thereon;

(5) Check all the unindexed instruments, frequently as many as 50 to 80 in number;

(6) Wait in line to record and then record;

(7) Obtain recorder's receipt and fill in time, instrument number, etc., and then conform copies;

(8) Wait for the deed book and page numbers, frequently for as long as an hour or more. (Trial Testimony.)

(38) In certifying a title to real property, an attorney becomes the person ultimately liable in the event a defect is subsequently discovered. This is true even if the purchaser of the real estate secures title insurance for, in that event, the attorney's certification is to the title insurance company. If the attorney has made an error in examining or evaluating the title, the purchaser of the real estate is protected by his insurance company which, in turn, is entitled to proceed against the attorney for any error in the certification. Accordingly, the attorney bears the ultimate responsibility, ethically and financially, for the examination and certification of a title in any transfer of real property. Furthermore, the liability of the attorney is not limited by the purchase price of the property, but increases over the years as the value of the property increases, either through inflation or appreciation. (Trial Testimony.)

(49) Defendant Faifax Bar Association does not examine

and certify titles to real property or provide legal services of any kind. (Trial Testimony.)

(54) There is no evidence that the promulgation of an advisory minimum fee schedule by the Fairfax Bar Association has affected prices adversely to consumers. (Trial Testimony.)

* * *

STIPULATIONS OF THE PARTIES

* * *

3. The contract price of the Reston home was $54,500, to be financed by a deposit with the contract of $2,000, a down payment of $37,500 and a $15,000 loan from the Northern Virginia Savings and Loan Association, 5350 Lee Highway, Arlington, Virginia, secured by a first trust on the property. Plaintiffs purchased title insurance, which covered the interest of the mortgagee and their own interests in the property, and obtained the services of an attorney licensed to practice law in the State of Virginia for the purpose of concluding the legal aspects of the purchase, including particularly examination and certification of the state of the title to the property to be acquired.

4. The contract provided that the closing on their home would take place at the offices of A. Burke Hertz, an attorney licensed to practice law in the State of Virginia, who maintains offices at 210 Little Falls Street, Falls Church, Virginia, which is in the county of Fairfax.

* * *

9. The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including Section 54-49 of the Code. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct

of attorneys and the operations of the State Bar which are found in Sections II and IV of Part VI of the Rules of the Supreme Court.

10. The powers of the State Bar have been delegated to the Council of the State Bar, which is comprised of one person from each Judicial Circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia, and the President, President-Elect and immediate Past President, all of whom serve as *ex officio* members.

11. Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a court of appropriate jurisdiction for further disciplinary proceedings.

* * *

14. In 1962 and 1969 attorneys who were members of the State Bar prepared on behalf of the State Bar Minimum Fee Schedule Reports, copies of which are annexed hereto as Exhibits 26 and 27.

15. Exhibits 26 and 27 became the basis for the minimum fee schedules published by the Local Bar Associations in 1962 and 1969 . . . .

* * *

17. The State Bar has been given authority to issue opinions on matters which the Supreme Court of Virginia says involve questions of ethics.

18. The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of Local Bar Associations involve questions of ethics within the meaning of paragraph 17.

19. The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics such as Opinions 98 and 170 which relate to minimum fee schedules and to disseminate minimum fee schedule reports, such as Exhibits 26 and 27. Copies of Opinions 98 and 170 are annexed hereto as Exhibits 30 and 31.

* * *

22. The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia.

23. Virginia attorneys who provide legal services to prospective home buyers in Reston, Virginia are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia.

24. The State Bar has never received a communication from a Local Bar Association regarding the professional conduct of any member of said Associations or of the State Bar, including failure of such members to follow a minimum fee schedule.

25. The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule.

26. Minimum fee schedules of some type are published and circulated in at least 34 states and in the District of Columbia either by the voluntary bar or by the counterpart of the State Bar.